THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1995 CUMULATIVE SUPPLEMENT

Volume 8

Chapters 41A through 52C

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of
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Annotated through 457 S.E.2d 524. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 8 contains the general laws of a permanent nature enacted by the General Assembly through the 1995 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1995 Regular Session affecting Chapters 41A through 52B of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 340, p. 364.
North Carolina Court of Appeals Reports through Volume 118, p. 737.
South Eastern Reporter 2nd Series through Volume 457, p. 524.
Federal Reporter 3rd Series through Volume 53, p. 349.
Federal Supplement through Volume 882, p. 1100.
Federal Rules Decisions through Volume 160, p. 664.
Bankruptcy Reports through Volume 181, p. 677.
Supreme Court Reporter through Volume 115, p. 2020.
North Carolina Law Review through Volume 73, p. 1760.
Wake Forest Law Review through Volume 30, p. 426.
Campbell Law Review through Volume 17, p. 163.
Duke Law Journal through Volume 44, p. 1049.
North Carolina Central Law Journal through Volume 21, p. 178.
Opinions of the Attorney General.

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The General Statutes of North Carolina
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VOLUME 8

Chapter 41A.
State Fair Housing Act.

§ 41A-4. Unlawful discriminatory housing practices.

CASE NOTES

In order for this Act to apply, the discriminatory housing practice must first: (1) occur in a "real estate transaction", and (2) discriminate "because of" one of the reasons listed in this section. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

Defendants failed to meet the threshold question of showing that plaintiff did not allow defendants to place a mobile home on the property "because of" defendant's handicapping condition. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

§ 41A-7. Enforcement.

Legal Periodicals. — For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

Chapter 42.

Landlord and Tenant.

Article 2A.

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42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs.
42-73. Collection of rent.
42-74. Preliminary or emergency relief.
42-75. Cumulative remedies.
42-76. Civil immunity.

ARTICLE 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter. (1981, c. 566, s. 1; 1995, c. 419, s. 1.1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to acts committed on or after that date, added "or Article 7".

Legal Periodicals. —
For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-25.7. Distress and distraint not permitted.

It is the public policy of the State of North Carolina that distress and distraint are prohibited and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2. (1981, c. 566, s. 1; 1995, c. 460, s. 8.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, substituted "rights concerning" for "security interests or liens on", and "G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 44A-2(e)".

§ 42-25.9. Remedies.

(a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2 the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(c) The remedies created by this section are supplementary to all existing common-law and statutory rights and remedies.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S.42-25.9(g), 42-25.9(h), or 42-36.2, deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days.

(g) Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. If the landlord elects to sell the property at public or private sale, the landlord shall give written notice to the tenant by first-class mail to the tenant's last known address at least seven days prior to the day of the sale. The seven-day notice of sale may run concurrently with the 10-day period which allows the tenant to request possession of the property. The written notice shall state the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, storage fees, and sale costs, shall be disbursed to the tenant, upon request, within 10 days after the sale, and will thereafter be delivered to the government of the county in which the rental property is located. Upon the tenant's request prior to the day of sale, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. The landlord may apply the proceeds of the sale to the unpaid rents, damages, storage fees, and sale costs. Any surplus from the sale shall be disbursed to the tenant, upon request, within 10 days of the sale and shall thereafter be delivered to the government of the county in which the rental property is located.

(h) If the total value of all property remaining on the premises at the time of execution of a writ of possession in an action for summary ejectment is less than one hundred dollars ($100.00), then the property shall be deemed abandoned five days after the time of execution, and the landlord may throw away or dispose of the property. Upon the tenant's request prior to the expiration of the five-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. (1981, c. 566, s. 1; 1985, c. 612, ss. 1-4; 1995, c. 460, ss. 1-3.)

Effect of Amendments. — Session Laws 1995, c. 460, ss. 1, 2 and 3, effective January 1, 1996, substituted "G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 44A-2(e) or 42-25.9(d)" in subsection (b); substituted "G.S. 42-25.9(g), 42-25.9(h), or 42-36.2" for "G.S. 42-36.2 or G.S. 44A-2(e)" in subsection (d); and added subsections (g) and (h).

CASE NOTES

Recovery of Treble Damages and Attorney's Fees. — The prohibition against punitive or treble damages in wrongful eviction actions contained in subsection (a) does not preclude tenants from recovering treble damages under § 75-16 and attorney's fees under § 75-16.1 of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

OPINIONS OF ATTORNEY GENERAL

Summary ejectment proceedings are a landlord's exclusive remedy to regain possession of his property; the General Assembly did not intend for other statutory provisions, such as § 1-111, to apply to summary ejectment proceedings. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

The only undertaking the General Assembly intended to require of the defendants is the rent undertaking that § 42-34 provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

A summary ejectment action heard by a magistrate is an expedited judicial proceeding; under § 7A-214, the trial of a small claim summary ejectment action is set no more than 30 days after the action is commenced. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Pleadings in small claim summary ejectment actions are the same as in other small claim actions. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Safety, — N.C.A.G. — (February 10, 1995).

A defendant is not required to file any pleading at all to maintain a defense in a summary ejectment proceeding. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Defendants in summary ejectment actions are not required to post bond before pleading, pursuant to § 1-111. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed the jurisdictional amount established by G.S. 7A-210(1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code,

s. 1767; Rev., s. 2002; C.S., s. 2367; 1971, c. 533, s. 4; 1973, c. 1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4; 1983, c. 332, s. 2; 1985, c. 329, s. 1; 1989, c. 311, s. 3; 1993, c. 553, s. 73(c); 1995, c. 460, s. 4.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in the first sentence substituted "seven days" for "10 days", and added "excluding weekends and legal holidays".

§ 42-29. Service of summons.

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C.S., s. 2368; 1973, c. 87; 1983, c. 332, s. 1; 1985, c. 102; 1995, c. 460, s. 5.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in the first sentence added "no later than the end of the next business day or as soon as practicable", and substituted "the defendant's" for "his", added "within five days of the issuance of the summons" in the second sentence, and in the third sentence added "or does not result in service to the defendant" and "within five days of the issuance of the summons".

§ 42-30. Judgment by confession or where plaintiff has proved case.

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-31. Trial by magistrate.

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-34. Undertaking on appeal and order staying execution.

OPINIONS OF ATTORNEY GENERAL

The only undertaking the General Assembly intended to require of summary ejectment defendants is the rent undertaking that this section provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-36.1A. Judgments for possession more than 30 days old.

Prior to obtaining execution of a judgment that has been entered for more than 30 days for possession of demised premises, a landlord shall sign an affidavit stating that the landlord has neither entered into a formal lease with the defendant nor accepted rental money from the defendant for any period of time after entry of the judgment. (1995, c. 460, s. 7.)

Editor's Note. — Session Laws 1995, c. 460, s. 10, made this section effective January 1, 1996.

§ 42-36.2. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property.

(a) When Sheriff May Remove Property. — Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

(1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or

(2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant

because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff May Store Property. — When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. Within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the Sheriff. — A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice. — The notice required by subsection (a) shall inform the tenant that failure to request possession of any property on the premises within 10 days of execution may result in the property being thrown away, disposed of, or sold. Notice shall be made by one of the following methods:

(1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;

(2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or

(3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ. (1983, c. 672, s. 1; 1995, c. 460, s. 6.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in subsection (a) divided the former first sentence into the present first and second sentences, deleted "to" from the end of the present first sentence, and added "The time within which the sheriff shall have to execute the writ shall" in the present second sentence; in subsection (b) added the fifth, sixth and seventh sentences, and added "If the tenant does not request release of the property within 10 days" in the eighth sentence; and added the language beginning "inform the tenant" and ending "Notice shall" in the introductory language of subsection (d).

ARTICLE 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

Legal Periodicals. —
For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-37.2. Remedies.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

ARTICLE 5.

Residential Rental Agreements.

§ 42-38. Application.

CASE NOTES

Cited in Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition;

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances

supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations; and

(5) Provide operable smoke detectors, either battery- operated or electrical, having an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, that are installed in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord must replace or repair the smoke detectors provided the landlord is notified of needed replacement or repairs in writing by the tenant. Unless the landlord and the tenant have a written agreement to the contrary, the landlord must place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant must replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1; 1995, c. 111, s. 2.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to residential rental agreements in effect on or after that date, deleted "and" from the end of subdivision (a)(3); added "and" to the end of subdivision (a)(4); and added subdivision (a)(5).

Legal Periodicals. —

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

Breach of the Implied Warranty of Habitability. — Court's conclusion that the amount of rent owed by defendant abated in compensation for plaintiff's violations of housing code, pursuant to this section, mandated a further conclusion that plaintiff violated subsections (a)(1), (2), and (3) and hence breached the implied warranty of habitability. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Rent Abatement Allowed for Unfit Apartment. —

Where the court should have found that plaintiff breached the implied warranty of habitability it was error to not award abatement damages to defendants for that breach. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Efforts to Repair Did Not Preclude Rent Abatement. — Where plaintiff violated this section, the trial court could not deny rent abatements for two months because of plaintiff's reasonable efforts to repair during those months. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 42-43. Tenant to maintain dwelling unit.

(a) The tenant shall:

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector provided by the landlord, or knowingly permit any person to do so;

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes;

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces; and

(7) Notify the landlord of the need for replacement of or repairs to a smoke detector. Nothing in this bill shall prohibit an individual landlord in a written agreement with the tenant from requiring the tenant to provide notice in writing of the need for replacement of or repairs to a smoke detector. Unless the landlord and the tenant have a written agreement to the contrary, the landlord must place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant must replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1; 1995, c. 111, s. 3.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to residential rental agreements in effect on or after that date, inserted "nor render inoperable the smoke detector provided by the landlord" following "premises" in subdivision (a)(4); and added subdivision (a) (7) and made related changes.

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§ 42-56. Application of Article.

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina", see 21 N.C. Cent. L.J. 79 (1995).

§§ 42-57, 42-58: Reserved for future codification purposes.

ARTICLE 7.

Expedited Eviction of Drug Traffickers and Other Criminals.

§ 42-59. Definitions.

As used in this Article:

(1) "Complete eviction" means the eviction and removal of a tenant and all members of the tenant's household.

(2) "Criminal activity" means (i) activity that would constitute a violation of G.S. 90-95 other than a violation of G.S. 90-95(a)(3), or a conspiracy to violate any provision of G.S. 90-95 other than G.S. 90-95(a)(3); or (ii) other criminal activity that threatens the health, safety, or right of peaceful enjoyment of the entire premises by other residents or employees of the landlord.

(3) "Entire premises" or "leased residential premises" means a house, building, mobile home, or apartment, whether publicly or privately owned, which is leased for residential purposes. These terms include the entire building or complex of buildings or mobile home park and all real property of any nature appurtenant thereto and used in connection therewith, including all individual rental units, streets, sidewalks, and common areas. These terms do not include a hotel, motel, or other guest house or part thereof rented to a transient guest.

(4) "Felony" means a criminal offense that constitutes a felony under North Carolina law.

(5) "Guest" means any natural person who has been given express or implied permission by a tenant, a member of the tenant's household, or another guest of the tenant to enter an individual rental unit or any portion of the entire premises.

(6) "Individual rental unit" means an apartment or individual dwelling or accommodation which is leased to a particular

tenant, whether or not it is used or occupied or intended to be used or occupied by a single family or household.

(7) "Landlord" means a person, entity, corporation, or governmental authority or agency who or which owns, operates, or manages any leased residential premises.

(8) "Partial eviction" means the eviction and removal of specified persons from a leased residential premises.

(9) "Resident" means any natural person who lawfully resides in a leased residential premises who is not a signatory to a lease or otherwise has no contractual relationship to a landlord. The term includes members of the household of a tenant.

(10) "Tenant" means any natural person or entity who is a named party or signatory to a lease or rental agreement, and who occupies, resides in, or has a legal right to possess and use an individual rental unit. (1995, c. 419, s. 1.)

Editor's Note. — Session Laws 1995, c. 419, s. 3, provides that this Article is effective October 1, 1995, and is applicable to acts committed on or after that date.

Session Laws 1995, c. 419, s. 2 contains a severability clause.

§ 42-59.1. Statement of Public Policy.

The General Assembly recognizes that the residents of this State have the right to the peaceful, safe, and quiet enjoyment of their homes. The General Assembly further recognizes that these rights, as well as the health, safety, and welfare of residents, are often jeopardized by the criminal activity of other residents of rented residential property, but that landlords are often unable to remove those residents engaged in criminal activity. In order to ensure that residents of this State can have the peaceful, safe, and quiet enjoyment of their homes, the provisions of this Article are deemed to apply to all residential rental agreements in this State. (1995, c. 419, s. 1.)

§ 42-60. Nature of actions and jurisdiction.

The causes of action established in this Article are civil actions to remove tenants or other persons from leased residential premises. These actions shall be brought in the district court of the county where the individual rental unit is located. If the plaintiff files the complaint as a small claim, the parties shall not be entitled to discovery from the magistrate. However, if such a case is filed originally in the district court or is appealed from the judgment of a magistrate for a new trial in the district court, all of the procedures and remedies in this Article shall be applicable. (1995, c. 419, s. 1.)

§ 42-61. Standard of proof.

The civil causes of action established in this Article shall be proved by a preponderance of the evidence, except as otherwise expressly provided in G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-62. Parties.

(a) Who May Bring Action. — A civil action pursuant to this Article may be brought by the landlord of a leased residential premises, or the landlord's agent, as provided for in G.S. 1-57 of the General Statutes and in Article 3 of this Chapter.

(b) Defendants to the Action. — A civil action pursuant to this Article may be brought against any person within the jurisdiction of the court, including a tenant, adult or minor member of the tenant's household, guest, or resident of the leased residential premises. If any defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him or her.

(c) Notice to Defendants. — A complaint initiating an action pursuant to this Article shall be served in the same manner as serving complaints in civil actions pursuant to G.S. 1A-1, Rule 4 and G.S. 42-29. (1995, c. 419, s. 1.)

§ 42-63. Remedies and judicial orders.

(a) Grounds for Complete Eviction. — Subject to the provisions of G.S. 42-64 and pursuant to G.S 42-68, the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit where it finds that:

(1) Criminal activity has occurred on or within the individual rental unit leased to the tenant; or

(2) The individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity; or

(3) The tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(4) The tenant has given permission to or invited a person to return or reenter any portion of the entire premises, knowing that the person has been removed and barred from the entire premises pursuant to this Article or the reasonable rules and regulations of a publicly assisted landlord; or

(5) The tenant has failed to notify law enforcement or the landlord immediately upon learning that a person who has been removed and barred from the tenant's individual rental unit pursuant to this Article has returned to or reentered the tenant's individual rental unit.

(b) Grounds for Partial Eviction and Issuance of Removal Orders. — The court shall, subject to the provisions of G.S. 42- 64, order the immediate removal from the entire premises of any person other than the tenant, including an adult or minor member of the tenant's household, where the court finds that such person has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises. Persons removed pursuant to this section shall be barred from returning to or reentering any portion of the entire premises.

(c) Conditional Eviction Orders Directed Against the Tenant. — Where the court finds that a member of the tenant's household or a guest of the tenant has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises, but such person has not been named as a party defendant, has not appeared in the action or otherwise has not been subjected to the jurisdiction of the court, a conditional eviction order issued pursuant to subsection (b) of this section shall be directed against the tenant, and shall provide that as an express condition of the tenancy, the tenant shall not give permission to or invite the barred person or persons to return to or reenter any portion of the entire premises. The tenant shall acknowledge in writing that the tenant understands the terms of the court's order, and that the tenant further understands that the failure to comply with the court's order will result in the mandatory termination of the tenancy pursuant to G.S. 42-68. (1995, c. 419, s. 1.)

§ 42-64. Affirmative defense or exemption to a complete eviction.

(a) Affirmative Defense. — The court shall refrain from ordering the complete eviction of a tenant pursuant to G.S. 42- 63(a) where the tenant has established that the tenant was not involved in the criminal activity and that:

(1) The tenant did not know or have reason to know that criminal activity was occurring or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(2) The tenant had done everything that could reasonably be expected under the circumstances to prevent the commission of the criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

Notwithstanding the court's denial of eviction of the tenant, if the plaintiff has proven that an evictable offense under G.S. 42- 63 was committed by someone other than the tenant, the court shall order such other relief as the court deems appropriate to protect the interests of the landlord and neighbors of the tenant, including the partial eviction of the culpable household members pursuant to G.S. 42-63(b) and conditional eviction orders under G.S. 42-63(c).

(b) Subsequent Affirmative Defense to a Complete Eviction. — The affirmative defense set forth in subsection (a) of this section shall not be available to a tenant in a subsequent action brought pursuant to this Article unless the tenant can establish by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second criminal activity.

(c) Exemption. — Where the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, taking into account the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises. The burden of proof for the exemption set forth shall be by clear and convincing evidence. (1995, c. 419, s. 1.)

§ 42-65. Obstructing the execution or enforcement of a removal or eviction order.

Any person who knowingly violates any order issued pursuant to this Article or who knowingly interferes with, obstructs, impairs, or prevents any law enforcement officer from enforcing or executing any order issued pursuant to this Article, shall be subject to criminal contempt under Article 1 of Chapter 5A of the General Statutes. Nothing in this section shall be construed in any way to preclude or preempt prosecution for any other criminal offense. (1995, c. 419, s. 1.)

§ 42-66. Motion to enforce eviction and removal orders.

(a) A motion to enforce an eviction or removal order issued pursuant to G.S. 42-63(b) or (c) shall be heard on an expedited basis and within 15 days of the service of the motion.

(b) Mandatory Eviction. — The court shall order the immediate eviction of the tenant where it finds that:

(1) The tenant has given permission to or invited any person removed or barred from the leased residential premises pursuant to this Article to return to or reenter any portion of the premises; or

(2) The tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred pursuant to this Article has returned to or reentered the tenant's individual rental unit; or

(3) The tenant has otherwise knowingly violated an express term or condition of any order issued by court pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-67. Impermissible defense.

It shall not be a defense to an action brought pursuant to this Article that the criminal activity was an isolated incident or otherwise has not recurred. Nor is it a defense that the person who actually engaged in the criminal activity no longer resides in the tenant's individual rental unit. However, evidence of such facts may be admissible if offered to support affirmative defenses or grounds for an exemption pursuant to G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-68. Expedited proceedings.

Where the complaint is filed as a small claim, the expedited process for summary ejectment, as provided in Article 3 of this Chapter and Chapter 7A of the General Statutes, applies. Where the complaint is filed initially in the district court or a judgment by the magistrate is appealed to the district court, the procedure in G.S. 42-34(b) through (g), if applicable, and the following procedures apply:

(1) Expedited Hearing. — When a complaint is filed initiating an action pursuant to this Article, the court shall set the matter for a hearing which shall be held on an expedited basis and within the first term of court falling after 30 days from the service of the complaint on all defendants or from service of notice of appeal from a magistrate's judgment, unless either party obtains a continuance. However, where a defendant files a counterclaim, the court shall reset the trial for the first term of court falling after 30 days from the defendant's service of the counterclaim.

(2) Standards for Continuances. — The court shall not grant a continuance, nor shall it stay the civil proceedings pending the disposition of any related criminal proceedings, except as required to complete permitted discovery, to have the plaintiff reply to a counterclaim, or for compelling and extraordinary reasons or on application of the district attorney for good cause shown.

(3) When Presented. — The defendant in an action brought in district court pursuant to this Article shall serve an answer within 20 days after service of the summons and complaint, or within 20 days after service of the appeal to district court when the action was initially brought in small claims court. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer.

(4) Extensions of Time for Filing. — The parties to an action brought pursuant to this Article shall not be entitled to an extension of time for completing an act required by subdivision (3) of this section, except for compelling and extraordinary reasons.

(5) Default. — A party to an action brought pursuant to this Article who fails to plead in accordance with the time periods in subdivision (3) of this section shall be subject to the provisions of G.S. 1A-1, Rule 55.

(6) Rules of Civil Procedure. — Unless otherwise provided for in this Article, G.S. 1A-1, the Rules of Civil Procedure, shall apply in the district court to all actions brought pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-69. Relation to criminal proceedings.

(a) Criminal Proceedings, Conviction, or Adjudication Not Required. — The fact that a criminal prosecution involving the criminal activity is not commenced or, if commenced, has not yet been concluded or has terminated without a conviction or adjudication of delinquency shall not preclude a civil action or the issuance of any order pursuant to this Article.

(b) Effect of Conviction or Adjudication. — Where a criminal prosecution involving the criminal activity results in a final criminal conviction or adjudication of delinquency, such adjudication or conviction shall be considered in the civil action as conclusive proof that the criminal activity occurred.

(c) Admissibility of Criminal Trial Recordings or Transcripts. — Any evidence or testimony admitted in the criminal proceeding, including recordings or transcripts of the adult or juvenile criminal proceedings, whether or not they have been transcribed, may be admitted in the civil action initiated pursuant to this Article.

(d) Use of Sealed Criminal Proceeding Records. — In the event that the evidence or records of a criminal proceeding which did not result in a conviction or adjudication of delinquency have been sealed by court order, the court in a civil action brought pursuant to this Article may order such evidence or records, whether or not they have been transcribed, to be unsealed if the court finds that such evidence or records would be relevant to the fair disposition of the civil action. (1995, c. 419, s. 1.)

§ 42-70. Discovery.

(a) The parties to an action brought pursuant to this Article shall be entitled to conduct discovery, if the action is filed originally in or appealed to the district court, only in accordance with this section.

(b) Any defendant must initiate all discovery within the time allowed by this Article for the filing of an answer or counterclaim.

(c) The plaintiff must initiate all discovery within 20 days of service of an answer or counterclaim by a defendant.

(d) All parties served with interrogatories, requests for production of documents, and requests for admissions under G.S. 1A-1, Rules 33, 34, and 36 shall serve their responses within 20 days.

(e) Upon application by the plaintiff, or agreement of the parties, the court shall issue a preliminary injunction against all alleged illegal activity by the defendant or other identified parties who are residents of the individual rental unit or guests of defendants, pending the completion of discovery and any other wait before the trial has occurred. (1995, c. 419, s. 1.)

§ 42-71. Protection of threatened witnesses or affiants.

If proof necessary to establish the grounds for eviction depends, in whole or in part, upon the affidavits or testimony of witnesses who are not peace officers, the court may, upon a showing of prior threats of violence or acts of violence by any defendant or any other person, issue orders to protect those witnesses, including the nondisclosure of the name, address, or any other information which may identify those witnesses. (1995, c. 419, s. 1.)

§ 42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs.

A law enforcement agency may make available to any person or entity authorized to bring an action pursuant to this Article any police report or edited portion thereof, or forensic laboratory report or edited portion thereof, concerning criminal activity committed on or in the immediate vicinity of the leased residential premises. A law enforcement agency may also make any officer or officers available to testify as a fact witness or expert witness in a civil action brought pursuant to this Article. The agency shall not disclose such information where, in the agency's opinion, such disclosure would jeopardize an investigation, prosecution, or other proceeding, or where such disclosure would violate any federal or State statute. (1995, c. 419, s. 1.)

§ 42-73. Collection of rent.

A landlord shall be entitled to collect rent due and owing with knowledge of any illegal acts that violate the provisions of this act without such collection constituting a waiver of the alleged defaults. (1995, c. 419, s. 1.)

§ 42-74. Preliminary or emergency relief.

The district court shall have the authority at any time to issue a temporary restraining order, grant a preliminary injunction, or take such other actions as the court deems necessary to enjoin or prevent the commission of criminal activity on or in the immediate vicinity of leased residential premises, or otherwise to protect the rights and interests of all tenants and residents. A violation of any such duly issued order or preliminary relief shall subject the violator to civil or criminal contempt. (1995, c. 419, s. 1.)

§ 42-75. Cumulative remedies.

The causes of action and remedies authorized by this Article shall be cumulative with each other and shall be in addition to, not in lieu of, any other causes of action or remedies which may be available at law or equity, including causes of action and remedies based on express provisions of the lease not contrary to this Article. (1995, c. 419, s. 1.)

§ 42-76. Civil immunity.

Any person or organization who, in good faith, institutes, participates in, or encourages a person or entity to institute or participate in a civil action brought pursuant to this Article, or who in good faith provides any information relied upon by any person or entity in instituting or participating in a civil action pursuant to this Article shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such person or organization shall have the same immunity from civil liability with respect to testimony given in any judicial proceeding conducted pursuant to this Article. (1995, c. 419, s. 1.)

Chapter 43.

Land Registration.

Article 8.

Assurance Fund.

Sec.
43-51. Satisfaction by third person or by Treasurer.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. —
For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 3.

Procedure for Registration.

§ 43-12. Effect of decree; approval of judge.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 4.

Registration and Effect.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 43-21. No right by adverse possession.

Legal Periodicals. —
For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Article 8.

Assurance Fund.

§ 43-51. Satisfaction by third person or by Treasurer.

If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C.S., s. 2424; 1993, c. 257, s. 1.)

Effect of Amendments. — The 1993 amendment, effective July 1, 1993, in the first sentence deleted "State Auditor, who shall issue his warrant therefor upon the" preceding "State Treasurer, and the same shall be paid".

Chapter 44.

Liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

Sec.
44-49.1. (Effective July 1, 1996) Lien created for payment of past-due child support obligations.
44-50. (Effective July 1, 1996) Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

44-51.8. Counties to which Article applies.

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

Section 44-50 must be read in conjunction with this section. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under § 44-50 is to have a lien such as is provided for in this section, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

§ 44-49.1. (Effective July 1, 1996) Lien created for payment of past-due child support obligations.

In the event that the Department of Human Resources or any other obligee, as defined in G.S. 110-129, provides written notification to an insurance company authorized to issue policies of insurance pursuant to this Chapter that a claimant or beneficiary under a contract of insurance owes past-due child support and accompanies this information with a certified copy of the court order ordering support together with proof that the claimant or beneficiary is past due in meeting this obligation, there is created a lien upon any insurance proceeds in favor of the Department or obligee. This section shall apply only in those instances in which there is a nonrecurring payment of a lump-sum amount equal to or in excess of three thousand dollars ($3,000) or periodic payments with an aggregate amount that equals or exceeds three thousand dollars ($3,000). (1995, c. 538, s. 6(a).)

Editor's Note. — Session Laws 1995, c. 538, s. 6, makes this section effective July 1, 1996, and applicable to child support owed on or after that date.

§ 44-50. (Effective until July 1, 1996) Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

CASE NOTES

The Employee Retirement Income Security Act preempts this section, the North Carolina apportionment statute. Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4th Cir. 1992).

This section must be read in conjunction with § 44-49. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under this section is to have a lien such as is provided for in § 44-49, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

§ 44-50. (Effective July 1, 1996) Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

Such a lien as provided for in G.S. 44-49 or G.S. 44-49.1 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, and past-due child support obligations, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of moneys recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2; 1995, c. 538, s. 6(b).)

For this section as in effect until July 1, 1996, see the main pamphlet.

Effect of Amendments. — The 1995 amendment, effective July 1, 1996, and applicable to child support owed on or after that date, inserted "or G.S. 44-9.1" following "G.S. 44-49", inserted "and past-due child support obligations" following "hospital service", and at the end substituted "moneys recovered" for "damages recovered".

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Craven, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6; 1987, c. 466; 1995, c. 9, s. 1.)

Effect of Amendments. — The 1995 amendment, effective March 13, 1995, inserted Graham and Macon in the list of counties.

Article 12.

Liens on Certain Agricultural Products.

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

CASE NOTES

Applied in United States v. Currituck Grain, Inc., 6 F.3d 200 (4th Cir. 1993).

Chapter 44A.

Editor's Note. — The legislation and annotations affecting Chapter 44A have been included in a recently published replacement chapter.

Chapter 45.

Mortgages and Deeds of Trust.

Article 2.

Right to Foreclose or Sell under Power.

Sec.
45-16. Register of deeds to make marginal entry of substituted trustee.

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

45-21.1. Definitions; construction.
45-21.3. [Repealed.]
45-21.7. Sale of separate tracts in different counties.
45-21.8. Sale as a whole or in parts.
45-21.9A. Simultaneous foreclosure of two or more instruments.
45-21.10. Requirement of cash deposit at sale.
45-21.15. Trustee's fees.

Part 2. Procedure for Sale.

45-21.16. Notice and hearing.
45-21.16A. Contents of notice of sale.
45-21.17. Posting and publishing notice of sale of real property.
45-21.17A. Requests for copies of notice.
45-21.21. Postponement of sale.
45-21.22. Procedure upon dissolution of order restraining or enjoining sale, or upon lifting of automatic bankruptcy stay.
45-21.23. Time of sale.
45-21.24. Continuance of uncompleted sale.

Sec.
45-21.27. Upset bid on real property; compliance bonds.
45-21.28. [Repealed.]
45-21.29. Orders for possession.
45-21.29A. No necessity for confirmation of sale.
45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.
45-21.33. Final report of sale of real property.

Article 2B.

Injunctions; Deficiency Judgments.

45-21.34. Enjoining mortgage sales on equitable grounds.
45-21.35. Ordering resales; receivers for property; tax payments.

Article 4.

Discharge and Release.

45-37. Discharge of record of mortgages, deeds of trust and other instruments.
45-37.2. Recording satisfactions of deeds of trust and mortgages.
45-38. Recording of foreclosure.

Article 9.

Instruments to Secure Equity Lines of Credit.

45-81. Definition.
45-82.1. Extension of period for advances.

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-16. Register of deeds to make marginal entry of substituted trustee.

Whenever any substituted trustee shall be appointed as provided in G.S. 45-10 through G.S. 45-17 and such designation of such substituted trustee shall have been registered, then it shall be the duty of the register of deeds to index the substitution of trustee as required by G.S. 161-14.1, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as provided for in G.S. 45-10 through G.S. 45-17. Whenever practical, the register of deeds may also make an appropriate notation on the margin of the registration of the mortgage, deed of trust, or other instrument securing the payment of money. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in G.S. 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in G.S. 45-10 through G.S. 45-17, and in which cases the register of deeds shall make, as to each recited instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7; 1991, c. 114, s. 6; 1993, c. 425, s. 2.)

Editor's Note. — Session Laws 1993, c. 425, s. 2, amended this section effective October 1, 1993, and applicable to fees collected and entries made on or after that date.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definitions; construction.

(a) The following definitions apply in this Article:

(1) "Resale" means a resale of real property or a resale of any leasehold interest created by a lease of real property held pursuant to G.S. 45-21.30.

(2) "Sale" means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust or (ii) a "power of sale", under this Article, authorized by other statutory provisions.

(b) The following constructions apply in this Article:

(1) The terms "mortgage" or "deed of trust" include leasehold mortgages or leasehold deeds of trust.

(2) The terms "mortgagee" or "trustee" include any person or entity exercising a power of sale pursuant to this Article.

(3) The terms "real property" or "property" include any leasehold interest created by a lease of real property. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1991, c. 255, s. 1; 1993, c. 305, s. 1.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

CASE NOTES

Cited in In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

§ 45-21.3: Repealed by Session Laws 1993, c. 305, s. 2, effective October 1, 1993, and applicable to instruments recorded prior to, on, or after that date.

§ 45-21.7. Sale of separate tracts in different counties.

(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale of each such tract shall be subject to separate upset bids. The clerk of the superior court of the county where the property is situated has jurisdiction with respect to upset bids of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1; 1993, c. 305, s. 3.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.8. Sale as a whole or in parts.

(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G.S. 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(b1) When real property is sold in parts, the sale of any such part is subject to a separate upset bid; and, to the extent the clerk of superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1; 1993, c. 305, s. 4.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

When two or more mortgages or deeds of trust held by the same person are secured in whole or in part by the same property, and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly. (1985, c. 515, s. 1; 1993, c. 305, s. 5.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.10. Requirement of cash deposit at sale.

(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee may require the highest bidder immediately to make a cash deposit not to exceed the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars ($750.00).

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1; 1993, c. 305, s. 6.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.15. Trustee's fees.

(a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.

(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

(1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;

(2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;

(3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to compensation as follows: (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) three-fourths after the hearing.

(4) Repealed by Session Laws 1993, c. 305, s. 7, effective October 1, 1993. (1949, c. 720, s. 1; 1993, c. 305, s. 7.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

CASE NOTES

Amount Held Proper. — Under the express provisions of the deed of trust instrument, where foreclosure was "commenced, but not completed," trustee was entitled to a "partial commission" computed as five percent of the outstanding indebtedness or the minimum stated in the deed of trust (whichever is greater), and where mortgagor exercised his right of redemption, five percent of that amount was the proper trustee's commission to be paid. In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Quoted in In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

(b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.

(2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

(3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. The term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under unrecorded leases or rental agreements shall not be considered record owners.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument at the time that the notice of hearing is filed.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.

(6) Repealed by Session Laws 1977, c. 359, s. 7.

(7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing

and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.

(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(8a) The name, address, and telephone number of the trustee or mortgagee.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

(11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal. A certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars ($100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above.

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2; 1993, c. 305, s. 8; 1995, c. 509, s. 135.1(g).)

Editor's Note. —

Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

The Rules of Civil Procedure, referred to in subsection (a), are codified at § 1A-1.

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "after default" in the second sentence of subsection (f).

CASE NOTES

Editor's Note. — *Many of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Minimum Due Process Requirements. — The previous foreclosure statute was declared unconstitutional because it did not provide adequate notice of foreclosure and did not provide a foreclosure hearing, but this section was enacted to satisfy these minimum due process requirements. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Guaranty Agreements. — By their terms, this section and § 45-21.17 (the anti-deficiency statute) govern only the relationship between mortgagors and mortgagees, and are designed to protect interests in the property to be sold. Contract rights such as those in guaranty agreements do not fall within the coverage of those sections. Private third party guarantors of loans are not required by this section to give notice to those whose obligations they guarantee before seeking indemnity from them. Any notice requirement in such a situation is imposed by the contract between the parties, not by the antideficiency statute. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Veterans Administration Subrogation and Indemnification Rights. — When pursuing its subrogation rights, the Veterans Administration must stand in the shoes of the private lender and meet any applicable state law requirements for recovery, but indemnity is an independent right arising under federal law, and is unaffected by state law. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

A superior court judge is not authorized to invoke equity jurisdiction in a hearing de novo, etc. —

The defense set forth in this section constitutes an affirmative defense within the meaning of Fed.R.Civ.P., Rule 8(c). Resolution Trust Corp. v. Southwest Dev. Co., 807 F. Supp. 375 (E.D.N.C.), modified, 837 F. Supp. 122 (E.D.N.C. 1992), aff'd in part and rev'd in part, 14 F.3d 596 (4th Cir. 1993).

No Valid Debt and No Default. — Where person executed notes and deed of trust based upon the understanding and for the specific consideration that no criminal proceedings would be instituted against her and criminal proceedings subsequently were instituted, the notes and deed of trust were without consideration, and the lower court was correct in finding (1) no valid debt existed and (2) there was no default on the notes or deed of trust, thereby properly disallowing the foreclosure proceeding. In re Kitchens, 113 N.C. App. 175, 437 S.E.2d 511 (1993).

Determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court. Therefore, if a party contends that the property is not secured, or should no longer be secured by the deed of trust, such contention may be raised as a defense to the four requisite findings under this section. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

Foreclosure under a power of sale in a mortgage is not favored in the law, and its exercise by the mortgagee will be watched with jealousy. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

The statutory scheme set forth in this section and § 45-21.17 applies directly to the Department of Veterans Affairs (VA) when it exercises its subrogation rights under state law to recover amounts paid to cover deficiencies after defaults on VA guaranteed loans. Under a subrogation theory, the VA's rights are the same as those of the lender who foreclosed, and thus are governed by state foreclosure law such as the North Carolina antideficiency statute. The VA therefore lost its right to subrogation against plaintiff-borrower when bank-lender failed to comply with the statutory notice requirements. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Service by Posting. —

Under this section, service by posting may run concurrently with any other effort to effect service; therefore, when the notice was posted on the property concurrent with the attempt to serve defendants by mail, the notice requirement was satisfied. McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994).

Requirements of Notice. — Subsection (c) lists the information the notice of hearing must contain and does not include a requirement that the notice contain the names of the parties entitled to notice, nor is such a requirement implied by the statute as a whole. McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994).

Notice Held Insufficient. —

Where plaintiff's sole attempt at personal service of notice consisted of a certified letter mailed to the business address of a partnership, a postal box number, this solitary venture constituted neither application of "due diligence" as required by Rule 4(j1) nor a "reasonable and diligent effort" as required by subsection (a). Barclays American/Mortgage Corp. v. BECA Enters., 116 N.C. App. 100, 446 S.E.2d 883 (1994).

Failure to Act When Actual Notice Received. — Because defendant received actual notice of the foreclosure hearing and could have taken advantage of the relief provided in § 45-21.34, assuming he had grounds, or he could have objected to the method of service, but instead chose to sit on his rights and allow the foreclosure to proceed, he may not argue now that service on him was inadequate. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Applied in In re Micheal Weinman Assocs. Gen. Partnership, 103 N.C. App. 756, 407 S.E.2d 288 (1991).

Quoted in Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991).

Cited in Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993); In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

§ 45-21.16A. Contents of notice of sale.

The notice of sale shall —

(1) Describe the instrument pursuant to which the sale is held, by identifying the original mortgagors and recording data. If the record owner is different from the original mortgagors, the notice shall also list the record owner of the property, as reflected on the records of the register of deeds not more than 10 days prior to posting the notice. The notice may also reflect the owner not reflected on the records if known;

(2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this Article;

(3) Describe the real property to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and may incorporate the description as used in the instrument containing the power of sale by reference thereto. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in such a manner as to enable prospective purchasers to determine what is and what is not being offered for sale;

(4) Repealed by Session Laws 1967, c. 562, s. 2.

(5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;

(6) Include any other provisions required by the instrument to be included therein;

(7) State that the property will be sold subject to taxes and special assessments if it is to be so sold; and

(8) State whether the property is being sold subject to or together with any subordinate rights or interests provided those rights and interests are sufficiently identified. (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 1; 1987, c. 493; 1993, c. 305, s. 9.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(1) Notice of sale of real property shall
   a. Be posted, in the area designated by the clerk of superior court for posting public notices in the county in which

the property is situated, at least 20 days immediately preceding the sale.

b. And in addition thereto,

1. The notice shall be published once a week for at least two successive weeks in a newspaper published and qualified for legal advertising in the county in which the property is situated.
2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.
3. In addition to the required newspaper advertisement, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

(2) When the notice of sale is published in a newspaper,

a. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays, and

b. The date of the last publication shall be not more than 10 days preceding the date of the sale.

(3) When the real property to be sold is situated in more than one county, the provisions of subdivisions (1) and (2) shall be complied with in each county in which any part of the property is situated.

(4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with G.S. 45-21.17A. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.

(5) Repealed by Session Laws 1993, c. 305, s. 10, effective October 1, 1993.

(6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16, 45-21.17, or 45-21.17A. (1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14; 1985, c. 567, s. 1; 1993, c. 305, s. 10.)

Editor's Note. —

Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

CASE NOTES

Editor's Note. *— Many of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Where neither trustee nor bank knew grantor's current Florida address, the trustee had no obligation to mail notice of sale to her by first-class mail. Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991), decided prior to 1993 amendment.

Guaranty Agreements. — By their terms, § 45-21.16 and this section (the anti-deficiency statute) govern only the relationship between mortgagors and mortgagees, and are designed to protect interests in the property to be sold. Contract rights such as those in guaranty agreements do not fall within the statute's coverage. Private third party guarantors of loans are not required by the statute to give notice to those whose obligations they guarantee before seeking indemnity from them. Any notice requirement in such a situation is imposed by the contract between the parties, not by the antideficiency statute. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Veterans Administration Subrogation and Indemnification Rights. — When pursuing its subrogation rights, the Veterans Administration must stand in the shoes of the private lender and meet any applicable state law requirements for recovery, but indemnity is an independent right arising under federal law, and is unaffected by state law. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

The statutory scheme set forth in § 45-21.16 and this section applies directly to the Department of Veterans Affairs (VA) when it exercises its subrogation rights under state law to recover amounts paid to cover deficiencies after defaults on VA guaranteed loans. Under a subrogation theory, the VA's rights are the same as those of the lender who foreclosed, and thus are governed by state foreclosure law such as the North Carolina antideficiency statute. The VA therefore lost its right to subrogation against plaintiff-borrower was lost when bank-lender failed to comply with the statutory notice requirements. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

§ 45-21.17A. Requests for copies of notice.

(a) Any person desiring a copy of any notice of sale may, at any time subsequent to the recordation of the security instrument and prior to the filing of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of each county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be a separate instrument entitled "Request for Notice" and shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

"REQUEST FOR NOTICE"

In accordance with the provisions of G.S. 45-21.17A, request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on ...., 19....., in Book ...., page ...., records of .... County, North Carolina, executed by .... as trustor (mortgagor), in which .... is named as beneficiary (mortgagee), and .... as trustee, be mailed to .... at the following address: ....

Signature: ....

[Acknowledgement]

(b) Register of Deeds' Duties. — Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may, instead of indexing such request on the general index of grantors, stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

(c) Mailing Notice. — The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in the Request for Notice, and directed to the address designated in such request.

(d) Effect of Request on Title. — No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.

(e) Evidence of Compliance. — The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then the party shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

(f) Action to Set Foreclosure Sale Aside for Failure to Comply. — A person entitled to notice of sale by virtue of this section shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property was purchased by someone other than the secured party; or if brought by the secured party, unless such action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value, if the property was purchased by the secured party. In either event, the party bringing such an action shall also tender an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

(g) Action for Damages from Foreclosure Sale for Failure to Comply. — A person entitled to notice of sale by virtue of this section shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33. The party bringing such an action shall also deposit with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action. (1993, c. 305, s. 11.)

Editor's Note. — Session Laws 1993, c. 305, s. 25 made this section effective October 1, 1993, and provides that the act applies to instruments recorded prior to, on, or after that date.

§ 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.

CASE NOTES

Attorney's Fees Upheld. — When a trustee of a deed of trust who is also a licensed attorney performed such extraordinary services as described in § 32-51 in connection with a foreclosure proceeding, counsel was entitled under this section to an award of attorney's fees as an "expense[ ] incurred with respect to the sale or proposed sale ...." In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Cited in Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

§ 45-21.21. Postponement of sale.

(a) Any person exercising a power of sale may postpone the sale to a day certain not later than 90 days, exclusive of Sunday, after the original date for the sale —

(1) When there are no bidders, or
(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
(4) When he is unable to hold the sale because of illness or for other good reason, or
(5) When other good cause exists.

The person exercising a power of sale may postpone the sale more than once whenever any of the above conditions are met, so long as the sale is held not later than 90 days after the original date for the sale.

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney —

(1) At the time and place advertised for the sale, publicly announce the postponement thereof;
(2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement; and

(3) Give written or oral notice of postponement to each party entitled to notice of sale under G.S. 45-21.17.

(c) The posted notice of postponement shall —

(1) State that the sale is postponed,
(2) State the hour and date to which the sale is postponed,
(3) State the reason for the postponement, and
(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor or within 90 days of the date originally fixed for the sale, then prior to such sale taking place the provisions of G.S. 45-21.16 need not be complied with but the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A shall be again complied with, or if on appeal, the appellate court orders the sale to be held, as to such sale so authorized the provisions of G.S. 45-21.16 need not be complied with again but those of G.S. 45-21.16A, 45-21.17, and 45-21.17A shall be.

(e) A sale may be postponed more than once provided the final postponed sale date is not later than 90 days, exclusive of Sunday and legal holidays, after the original date for the sale. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, ss. 4-6; 1983, c. 335, s. 2; 1989, c. 257; 1991 (Reg. Sess., 1992), c. 777, s. 1; 1993, c. 305, s. 12; 1995, c. 509, s. 25.)

Editor's Note. —
Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "G.S." following "but the provisions of" in subsection (d).

§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale, or upon lifting of automatic bankruptcy stay.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable.

(c) When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure is stayed by the debtor filing a bankruptcy petition and thereafter the stay is lifted, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. (1949, c. 720, s. 1; 1993, c. 305, s. 13.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.23. Time of sale.

A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day other than Sunday or a legal holiday. (1949, c. 720, s. 1; 1993, c. 305, s. 14.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.24. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday or a legal holiday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 720, s. 1; 1993, c. 305, s. 15.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.26. Preliminary report of sale of real property.

CASE NOTES

Cited in In re McDuffie, 114 N.C. App. 86, 440 S.E.2d 865 (1994).

§ 45-21.27. Upset bid on real property; compliance bonds.

(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid filed on the day following when said office is open for the regular dispatch of its business. Subject to the provisions of G.S. 45-21.30, there shall be no resales; rather, there may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held pursuant to G.S. 45-21.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c), (d) Repealed by Session Laws 1993, c. 305, s. 16, effective October 1, 1993.

(e) At the same time that an upset bid on real property is submitted to the court as provided for in subsection (a) above, together with a compliance bond if one is required, the upset bidder shall simultaneously file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(e1) When an upset bid is made as provided in this section, the clerk shall notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property.

(f) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, shall be released from any further obligation on account of the bid and any deposit or bond provided by him shall be released.

(g) Any person offering to purchase real property by upset bid as permitted in this Article shall be subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(h) The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure. (1949, c. 720, s. 1; 1963, c. 377; 1967, c. 979, s. 3; 1993, c. 305, s. 16.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

CASE NOTES

New Hearing Improper. — Trial court erred in allowing trustee to hold a new hearing and sale in foreclosure proceeding which added a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale, and the sale of the property had been confirmed by passage of the upset bid period. In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

§ 45-21.28: Repealed by Session Laws 1993, c. 305, s. 17, effective October 1, 1993, and applicable to instruments recorded prior to, on, or after that date.

§ 45-21.29. Orders for possession.

(a) through (j) Repealed by Session Laws 1993, c. 305, s. 18, effective October 1, 1993.

(k) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) Such property has been sold in the exercise of the power of sale contained in any mortgage, deed of trust, leasehold mortgage, leasehold deed of trust, or a power of sale authorized by any other statutory provisions,
(2) Repealed by Session Laws 1993, c. 305, s. 18, effective October 1, 1993.
(2a) The provisions of this Article have been complied with,
(3) The sale has been consummated, and the purchase price has been paid,
(4) The purchaser has acquired title to and is entitled to possession of the real property sold,
(5) Ten days' notice has been given to the party or parties who remain in possession at the time application is made, and
(6) Application is made by petition to such clerk by the mortgagee, the trustee, the purchaser of the property, or any such person's authorized representative.

(*l*) An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff and shall authorize him to remove all occupants and their personal property from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. The purchaser shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of personal property following execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes.

(m) When the real property sold is situated in more than one county, the provisions of subsection (*l*) of this section shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3; 1975, c. 492, ss. 7-9; 1987, c. 627, s. 3; 1993, c. 305, s. 18.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.29A. No necessity for confirmation of sale.

No confirmation of sales or resales of real property made pursuant to this Article shall be required. If an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed. (1967, c. 979, s. 3; 1993, c. 305, s. 19.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(a) If the terms of a sale of real property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) Repealed by Session Laws 1967, c. 562, s. 2.

(c) When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to the resale.

(d) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 10; 1977, c. 359, s. 15; 1993, c. 305, s. 20.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

CASE NOTES

A judgment creditor lacks standing to bring an action against a defaulting bidder as that term was used under this section prior to the 1993 amendment. Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476, aff'd per curium, 335 N.C. 165, 436 S.E.2d 131 (1993).

New Hearing Improper. — Trial court erred in allowing trustee to hold a new hearing and sale in foreclosure proceeding which added a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale, and the sale of the property had been confirmed by passage of the upset bid period. In re

Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

CASE NOTES

Trustee's Authority to Make Disbursements. — Chapter 45, Article 2A contains no language that suggests the trustee must seek or obtain approval from either the clerk of the superior court or the court prior to making the disbursements permitted in subsection (a), and where the instrument giving rise to foreclosure grants no one the right to contest the disbursements, the disbursements made pursuant to subsection (a) are within the sole province of the trustee. In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Payment of Attorney's Fees. — Although subsection (a) does not have specific reference to attorneys' fees, to the extent the instrument provides for the payment of such fees, they become an "obligation secured by" the instrument, thus, any entitlement to and the amount of attorneys' fees required for the conduct of the sale is also controlled by the instrument and subject to deduction from the sale proceeds. In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Cited in Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

§ 45-21.33. Final report of sale of real property.

(a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

(c) The person who holds the sale shall also file with the clerk —

(1) A copy of the notices of sale and resale, if any, which were posted, and

(2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published;

(3) Proof as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. 45-21.16, 45-21.17, 45-21.17A, and 45-21.30. In the absence of an affidavit to the contrary filed with the clerk, an affidavit by the person holding the sale that the notice of sale was posted in the area designated by the clerk of superior court for posting public notices in the county or counties in which the property is situated 20 days prior to the sale shall be proof of compliance with the requirements of G.S. 45-21.17(1)a.

(d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1; 1975, c. 492, s. 11; 1983, c. 799; 1993, c. 305, s. 21; 1995, c. 509, s. 26.)

Editor's Note. —
Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "G.S." preceding "45-21.17" near the beginning of subdivision (c)(3).

CASE NOTES

Clerk's Authority in Conducting Audit. — In conducting the "audit" under this section the clerk is merely authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee. In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Cited in In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales on equitable grounds.

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3; 1969, c. 44, s. 50; 1993, c. 305, s. 22.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

CASE NOTES

Failure to Seek Relief After Actual Notice. — Because defendant received actual notice of the foreclosure hearing and could have taken advantage of the relief provided in this section, assuming he had grounds, or he could have objected to the method of service, but instead chose to sit on his rights and allow the foreclosure to proceed, he may not argue now that service on him was inadequate. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Cited in Colson & Colson Constr. Co.

v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993); Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993).

§ 45-21.35. Ordering resales; receivers for property; tax payments.

The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the appellate division in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3; 1969, c. 44, s. 51; 1993, c. 305, s. 23.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

Legislative Intent. —

The protection of this section is only available to those parties who hold a property interest in the mortgaged property and is not applicable to other parties liable on the underlying debt. Resolution Trust Corp. v. Southwest Dev. Co., 807 F. Supp. 375 (E.D.N.C.), modified, 837 F. Supp. 122 (E.D.N.C. 1992), aff'd in part and rev'd in part, 14 F.3d 596 (4th Cir. 1993).

The General Assembly has twice amended Chapter 45 to clarify that foreclosures of leasehold interests are governed by the procedural guidelines in Article 2A and on neither occasion did the General Assembly make changes indicating an intention to include leasehold interests within the coverage of Article 2B. The General Assembly's silence on this subject is convincing proof that defendants, as lessees, lacked standing to assert the defense in this section. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Section Inapplicable to a Lease. — By its own terms this section applies only to sales of real estate and because a lease is a species of personal property, it is outside the scope of this section. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Defense Not Available to Guarantors. —

The defense set out in this section is not available to guarantors — even when they are also property owners — if they are sued to enforce their duties as a guarantor. Poughkeepsie Sav. Bank v. Harris, 833 F. Supp. 551 (W.D.N.C. 1993).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

CASE NOTES

The purpose of the anti-deficiency statute is to prevent oppression of a purchase money debtor by a purchase money creditor. The purchase money debtor has both an equitable and statutory right to redeem. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Legislative Intent. —

The enactment of this section was intended to benefit and protect purchasers of real property. Adams v. Cooper, 114 N.C. App. 459, 442 S.E.2d 141 (1994).

In interpreting the anti-deficiency statute, the overriding principle is that when the purchase money debtor defaults, the purchase money creditor is limited strictly to the property conveyed and nothing else. Adams v. Cooper, 340 N.C. 242, 456 S.E.2d 514 (1995).

Effect of Section. —

This section bars an action against the guarantors of a purchase money note to recover the debt for the balance of the purchase price represented by the note. Adams v. Cooper, 340 N.C. 242, 456 S.E.2d 514 (1995).

Purchase Money Debtor Cannot Be Forced to Elect. — Except for ad valorem taxes, property assessments and property insurance premiums paid by the purchase money creditor on behalf of the purchase money debtor, a purchase money debtor cannot be forced to elect between paying an amount in excess of the balance purchase price secured by a purchase money deed of trust or forfeiting the property at foreclosure. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Nor Can Right of Redemption Be Conditioned on Payment of Additional Moneys. — A purchase money debtor's exercise of his right of redemption cannot be conditioned on the payment of additional moneys not secured by the purchase money deed of trust. To hold otherwise would be to make the purchase money debtor personally liable, a consequence the anti-deficiency statute prohibits. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Purchase Money Creditor Limited to Recovery of Property. — A purchase money deed of trust creditor cannot bring an action on the note to recover the purchase price either before or after foreclosure and is strictly limited to the property which was conveyed for purposes of securing the balance of the purchase price. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Purchase Money Instruments. —

Where property to be sold at foreclosure under a supplemental deed of trust was not the property conveyed for which a purchase money note and purchase money deed of trust were given, yet the debt to be satisfied was that reflected by the purchase money note, the provisions of supplemental deed of trust purporting to provide additional security for the purchase money note were unenforceable under this section. Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993).

In Personam Actions Not Barred for Unsecured Notes. — This statute does not act to bar an in personam action where the promissory note is unsecured. Wilkinson v. SRW/Cary Assocs., 112 N.C. App. 846, 437 S.E.2d 3 (1993).

This section does not bar an in personam action against a non-mortgagor guarantor of a purchase money promissory note. Adams v. Cooper, 114 N.C. App. 459, 442 S.E.2d 141 (1994).

Fees of Attorneys of Purchase Money Creditor Not Secured. — Where a promissory note states on its face that it is "given as purchase money, and is secured by a purchase money deed of trust," and the note is incorporated by reference into the deed of trust, attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Duty to Mitigate Damages. — Plaintiffs were required to take only reasonable efforts to mitigate their damages; they were not required to attempt enforcement of either the note or the guaranty when a reasonable person would have concluded such efforts would be futile. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Holder of Subordinate Deed of Trust Cannot Bring In Personam Action. —

Anti-deficiency statute prohibits the holder of a second purchase money deed of trust from bringing an in personam action on the note for the debt even though the security has been "destroyed" by foreclosure of the first deed of trust. Paynter v. Maggiolo, 105 N.C. App. 312, 412 S.E.2d 691 (1992).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.46. Validation of foreclosure sales where posting and publication not complied with.

CASE NOTES

Determination of Effect of Deed of Trust. — While the parties are before the clerk of court, the clerk should have the authority to determine not only whether there is a power of sale in the deed of trust, but also whether the property sought to be sold under foreclosure is still legally secured by the deed of trust. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

ARTICLE 4.

Discharge and Release.

§ 45-37. Discharge of record of mortgages, deeds of trust and other instruments.

(a) Subject to the provisions of G.S. 45-73 relating to secured instruments which secure future advances, any deed of trust or mortgage or other instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be discharged and released of record in the following manner:

(1) By acknowledgment of the satisfaction of the provisions of such deed of trust, mortgage or other instrument in the presence of the register of deeds by:
  a. The trustee,
  b. The mortgagee,
  c. The legal representative of a trustee or mortgagee, or
  d. A duly authorized agent or attorney of any of the above.

  Upon acknowledgment of satisfaction, the register of deeds shall record a record of satisfaction as described in G.S. 45-37.2, and may forthwith make upon the margin of the record of such deed of trust, mortgage or other instrument an entry of such acknowledgment of satisfaction which shall be signed by the trustee, mortgagee, legal representative, agent or attorney and witnessed by the register of deeds, who shall also affix his name thereto.

(2) By exhibition of any deed of trust, mortgage or other instrument accompanied with the bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon, dated on or before December 31, 1995, and made by:
  a. The obligee,
  b. The mortgagee,
  c. The trustee,
  d. An assignee of the obligee, mortgagee, or trustee, or
  e. Any chartered banking institution, or savings and loan association, national or state, or credit union, qualified to do business in and having an office in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof. If the endorsement of payment and satisfaction is undated, no cancellation may be made pursuant to this subdivision.

Upon exhibition of the instruments, the register of deeds shall cancel the mortgage, deed of trust or other instrument by recording a record of satisfaction as described in G.S. 45-37.2, and may make an entry of satisfaction on the margin of the record. The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain possession of all of the instruments exhibited. The exhibition of the mortgage, deed of trust or other instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it. The register of deeds may require the person exhibiting the instruments for cancellation to furnish him an acknowledgment of cancellation of the mortgage, deed of trust or other instrument for the purpose of showing upon whose request and exhibition the mortgage, deed of trust or other instrument was canceled.

(3) By exhibiting to the register of deeds by:
  a. The grantor,
  b. The mortgagor, or
  c. An agent, attorney or successor in title of the grantor or mortgagor

of any mortgage, deed of trust or other instrument intended to secure the payment of money or the performance of any other obligation, together with the bond, note or other instrument secured thereby, or by exhibition of the mortgage, deed of trust or other instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of exhibition, all such instruments are more than 10 years old counting from the maturity date of the last obligation secured. If the instrument or instruments so exhibited have an endorsement of partial payment, satisfaction, performance or discharge within the said period of 10 years, the period of 10 years shall be counted from the date of the most recent endorsement.

The register of deeds shall cancel the mortgage, deed of trust, or other instrument by recording a record of satisfaction as described in G.S. 45-37.2, and may make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

(4) By exhibition to the register of deeds of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Upon exhibition of the deed of trust, and the evidences of indebtedness properly marked, the register of deeds shall cancel such deed of trust by recording a record of satisfaction as described in G.S. 45-37.2, and may make an entry of satisfaction upon the margin of the record, which record, or entry if made, shall be valid and binding upon all persons, if no person rightfully entitled to the deed of trust or evidences of indebtedness has previously notified the register of deeds in writing of the loss or theft of the instrument or evidences of indebtedness and has caused the register of deeds to record the notice or loss or theft in a separate document, as required by G.S. 161-14.1.

Upon receipt of written notice of loss or theft of the deed of trust or evidences of indebtedness the register of deeds shall record a record of satisfaction, as described in G.S. 45-37.2, which in this case shall consist of a rerecording of the record of the deed of trust containing the marginal entry and may make on the record of the deed of trust concerned a marginal entry in writing thereof, with the date of receipt of the notice. The deed of trust shall not be canceled after such recording of a record of satisfaction or marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

Every entry of acknowledgment of satisfaction or of satisfaction made or witnessed by the register of deeds as provided in subdivision (a)(1) shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

(5) By exhibition to the register of deeds of a notice of satisfaction of a deed of trust, mortgage, or other instrument which has been acknowledged by the trustee or the mortgagee before an officer authorized to take acknowledgments. The notice of satisfaction shall be substantially in the form set out in G.S. 47-46.1. The notice of satisfaction shall recite the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, and a reference by book and page number to the record of the instrument satisfied.

Upon exhibition of the notice of satisfaction, the register of deeds shall record the notice of satisfaction and cancel the deed of trust, mortgage, or other instrument as required by G.S. 45-37.2. No fee shall be charged for recording any documents or certifying any acknowledgments pursuant to this subdivision. The register of deeds shall not be required to verify or make inquiry concerning the authority of the person executing the notice of satisfaction to do so.

(6) By exhibition to the register of deeds of a certificate of satisfaction of a deed of trust, mortgage, or other instrument that has been acknowledged before an officer authorized to take acknowledgments by the owner of the note, bond, or other evidence of indebtedness secured by the deed of trust or mortgage. The certificate of satisfaction shall be accompanied by the note, bond, or other evidence of indebtedness, if available, with an endorsement of payment and satisfaction by the owner of the note, bond, or other evidence of indebtedness. If such evidence of indebtedness cannot be produced, an affidavit, hereafter referred to as an "affidavit of lost note", signed by the owner of the note, bond, or other evidence of indebtedness, shall be delivered to the register of deeds in lieu of the evidence of indebtedness certifying that the debt has been satisfied and stating: (i) the date of satisfaction; (ii) that the note, bond, or other evidence of indebtedness cannot be found; and (iii) that the person signing the affidavit is the current owner of the note, bond, or other evidence of indebtedness. The certificate of satisfaction shall be substantially in the form set out in G.S. 47-46.2 and shall recite the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, and a reference by book and page number to the record of the instrument satisfied. The affidavit of lost note, if necessary, shall be substantially in the form set out in G.S. 47-46.3.

Upon exhibition of the certificate of satisfaction and accompanying evidence of indebtedness endorsed paid and satisfied, or upon exhibition of an affidavit of lost note, the register of deeds shall record the certificate of satisfaction and either the accompanying evidence of indebtedness or the affidavit of lost note, and shall cancel the deed of trust, mortgage, or other instrument as required by G.S. 45-37.2. No fee shall be charged for recording any documents or certifying any acknowledgments pursuant to this subdivision. The register of deeds shall not be required to verify or make inquiry concerning the authority of the person executing the certificate of satisfaction to do so.

(b) It shall be conclusively presumed that the conditions of any deed of trust, mortgage or other instrument securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for valuable consideration from the mortgagor or grantor, from and after the expiration of 15 years from whichever of the following occurs last:

(1) The date when the conditions of such instrument were required by its terms to have been performed, or

(2) The date of maturity of the last installment of debt or interest secured thereby;

provided that the holder of the indebtedness secured by such instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:

(1) The amount of debt unpaid, which is secured by said instrument; or

(2) In what respect any other condition thereof shall not have been complied with; or

may record a separate instrument signed by the holder or party secured and witnessed by the register of deeds stating:

(1) Any payments that have been made on the indebtedness or other obligation secured by such instrument including the date and amount of payments and

(2) The amount still due or obligations not performed under the instrument.

Whenever practical, the register of deeds may also enter the information contained in the separate instrument on the margin of the record of the instrument. The effect of the filing of the affidavit or of the instrument recorded made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date 15 years from the filing of the affidavit or from the recording of the instrument or the making of the notation. There shall be only one postponement of the effective date of the conclusive presumption provided for herein. The register of deeds shall record the affidavit provided for herein and shall record a separate instrument, as required by G.S. 161-14.1, making reference to the filing of such affidavit and to the book and page where the affidavit is recorded. Whenever practical, the register of deeds may also make such a reference on the margin of the record of the deed of trust, mortgage, or other instrument referred to. This subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment or rolling stock, or of other personal property.

(c) Repealed by Session Laws 1991, c. 114, s. 4, effective January 1, 1992.

(d) For the purposes of this section "register of deeds" means the register of deeds, his deputies or assistants of the county in which the mortgage, deed of trust, or other instrument intended to secure the payment of money or performance of other obligation is registered.

(e) Any transaction subject to the provisions of the Uniform Commercial Code, Chapter 25 of the General Statutes, is controlled by the provisions of that act and not by this section.

(f) Whenever this section requires a signature or endorsement, that signature or endorsement shall be followed by the name of the person signing or endorsing the document printed, stamped, or typed so as to be clearly legible. The register of deeds may refuse to accept any document when the provisions of this subsection have not been met. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C.S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5; 1969, c. 746; 1975, c. 305; 1985, c.

219; 1987, c. 405, s. 1; c. 620, s. 1; 1989, c. 434, s. 1; 1991, c. 114, s. 4; 1995, c. 292, ss. 1, 2, 5.)

Effect of Amendments. — Session Laws 1995, c. 292, ss. 1 and 2, effective October 1, 1995, rewrote the second paragraph of subdivision (a)(5), and added subdivision (a)(6).

Session Laws 1995, c. 292, s. 5, effective January 1, 1996, in subdivision (a)(2) added "dated on or before December 31, 1995" in the introductory language, and added the last sentence of subdivision (a)(2)(e).

CASE NOTES

Editor's Note. — *The annotation to Woodcock v. Merrimon, 122 N.C. 731, 30 S.E. 321 (1898), which appears beneath the catchline **"Authority of Trustee to Cancel"** under this section in the main pamphlet, is incorrect. The annotation should read: **"Authority of Trustee to cancel.** This section only empowers the trustee to 'acknowledge satisfaction of the provisions of such trust, etc.,' the entry operating as a reconveyance. It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land. However, the creditor could be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if the release was done with the creditor's consent and authority was properly shown. Woodcock v. Merrimon, 122 N.C. 731, 30 S.E. 321 (1898). See also, Browne v. Davis, 109 N.C. 23, 13 S.E. 703 (1891)."*

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages.

(a) When a notice of satisfaction is recorded pursuant to G.S. 45-37(a)(5) or a certificate of satisfaction is recorded pursuant to G.S. 45-37(a)(6), the register of deeds shall make an entry of satisfaction on the notice or certificate and record and index the instrument.

(b) When a deed of trust, mortgage, or other instrument is satisfied by a method other than by means of a notice of satisfaction or certificate of satisfaction, the register of deeds shall record a record of satisfaction consisting of either a separate instrument or all or a portion of the original deed of trust or mortgage rerecorded, and shall make the appropriate entry of satisfaction as provided in G.S. 45-37 on each record of satisfaction. A separate instrument or original deed of trust or mortgage rerecorded pursuant to this subsection shall contain (i) names of all parties to the original instrument, (ii) the amount of the obligation secured, (iii) the date of satisfaction of the obligation, (iv) a reference by book and page number to the record of the instrument satisfied, and (v) the date of recording the notice of satisfaction.

(c) Whenever it is practical to do so, the register of deeds may make a marginal notation of satisfaction in addition to making the recordation required by this section. (1963, c. 1021, s. 1; 1967, c. 765, s. 6; 1987, c. 620, s. 2; 1991, c. 114, s. 2; 1993, c. 425, s. 3; 1995, c. 292, s. 6.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, rewrote this section.

§ 45-38. Recording of foreclosure.

In case of foreclosure of any deed of trust, or mortgage, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall record a notice of foreclosure and, whenever it is practical to do so, may also enter upon the margin of the record of the deed of trust or mortgage of the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason of the foreclosure. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall indicate in the notice of foreclosure which property was sold and which was not sold, and may make an additional notation indicating the same, whenever practical.

A notice of foreclosure shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference by book and page number to the record of the instrument foreclosed, and the date of recording the notice of foreclosure. (1923, c. 192, s. 2; C.S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2; 1971, c. 985; 1991, c. 114, s. 3; 1993, c. 305, s. 24.)

Editor's Note. — Session Laws 1993, c. 305, which amended this section, in s. 25 provides that the amendment applies to instruments recorded prior to, on, or after October 1, 1993.

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, in the first and second sentences of the first paragraph substituted "trustee, mortgagee, or the trustee's or mortgagee's attorney" for "trustee or mortgagee". As to the applicability of this amendment, see the editor's note.

Article 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-68. Requirements.

CASE NOTES

Effect of Agreement to Extend. — Where, under the explicit terms of savings and loan's deed of trust, the period within which owner's future obligations could be incurred expired on March 3, 1988, under the provisions of this section the only obligations incurred by the owner that related back to the recording date of the deed of trust were those incurred through March 3, 1988, and the obligations incurred after that date did not have seniority over plaintiff's intervening mechanic's lien. The agreement later made by owner and savings and loan to extend the term in which obligations could be incurred did not affect plaintiff's rights under the deed of trust as recorded. McNeary's Arborists, Inc. v. Carley Capital Group, 103 N.C. App. 650, 406 S.E.2d 644 (1991).

Cited in Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409 (1993).

§ 45-69. Fluctuation of obligations within maximum amount.

CASE NOTES

Applied in Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409 (1993).

§ 45-70. Priority of security instrument.

CASE NOTES

Future Advance Not Prioritized. — Because plaintiff corporate lender to farm partnership gave actual notice to additional lender that it had perfected a lien on farm property, the future advances made by additional lender to farm subsequent to the receipt of the notice and in excess of the cumulative amount initially stated in commitment letter was not obligatory and did "not take priority over" the plaintiff's loan. Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409, cert. denied, 335 N.C. 177, 438 S.E.2d 201 (1993).

ARTICLE 9.

Instruments to Secure Equity Lines of Credit.

§ 45-81. Definition.

(a) The term "equity line of credit" means an agreement in writing between a lender and a borrower for an extension of credit pursuant to which:

(1) At any time within a specified period not to exceed 30 years the borrower may request and the lender is obligated to provide, by honoring negotiable instruments drawn by the borrower or otherwise, advances up to an agreed aggregate limit;

(2) Any repayments of principal by the borrower within the specified period will reduce the amount of advances counted against the aggregate limit; and

(3) The borrower's obligation to the lender is secured by a mortgage or deed of trust relating to real property which mortgage or deed of trust shows on its face the maximum principal amount which may be secured at any one time and that it secures an equity line of credit governed by the provisions of this Article.

(b) As used in subdivision (a)(1) of this section, "lender is obligated" means that the lender is contractually bound to provide advances. The contract must set forth any events of default by the borrower, or other events not within the lender's control, which may relieve the lender from his obligation, and must state whether or not the lender has reserved the right to cancel or terminate the obligation.

(c) At any time when the balance of all outstanding sums secured by a mortgage or deed of trust pursuant to the provisions of this Article is zero, the lender shall, upon the request of the borrower, make written entry upon the security instrument showing payment and satisfaction of the instrument; provided, however, that such security instrument shall remain in full force and effect for the term set forth therein absent the borrower's request for such written entry. No prepayment penalty may be charged with respect to an equity line of credit loan. (1985, c. 207, s. 2; 1995, c. 237, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "30 years" for "15 years" in subdivision (a)(1).

CASE NOTES

Subsequent Advancements Secured by Deed of Trust. — Subsequent advancements, made pursuant to an original agreement establishing a line of credit, must be treated as if made and identified on the date of execution of that original agreement, and until such time as the orignal security agreement is cancelled pursuant to subsection (c), later loans are also secured by the deed of trust even if all previous debts or obligations have been paid in full. Raintree Realty & Constr., Inc. v. Kasey, 116 N.C. App. 340, 447 S.E.2d 823 (1994), aff'd, — N.C. —, 459 S.E.2d 273 (1995).

§ 45-82. Priority of security instrument.

CASE NOTES

Subsequent Advancements Treated as If Made on Date of Original Agreement. — Subsequent advancements, made pursuant to an original agreement establishing a line of credit, must be treated as if made and identified on the date of execution of that original agreement, and until such time as the original security agreement is cancelled pursuant to § 45-81(c), later loans are also secured by the deed of trust even if all previous debts or obligations have been paid in full. Raintree Realty & Constr., Inc. v. Kasey, 116 N.C. App. 340, 447 S.E.2d 823 (1994), aff'd, — N.C. —, 459 S.E.2d 273 (1995).

§ 45-82.1. Extension of period for advances.

(a) The period for advances agreed to pursuant to G.S. 45-81(a)(1) may be extended by written agreement of the lender and borrower executed prior to termination of the equity line of credit or the borrower's obligation to repay any outstanding indebtedness. Any extended period shall not exceed 30 years from the end of the preceding period for advances.

(b) A mortgage or deed of trust that secures an equity line of credit to which the lender and borrower have agreed to an extended period for advances shall have priority with respect to advances made after the preceding loan period from a date not later than the date of registration of the certificate described in subsection (c) of this section.

(c) The priority provided in subsection (b) of this section shall be accorded only if the grantor of the mortgage or the deed of trust securing the obligation, and other record owners of the real property therein conveyed, execute a certificate evidencing the extension and register the certificate in the office of the register of deeds where the mortgage or deed of trust is registered. The failure of any record owner to execute the certificate shall affect only that record owner's interest in the property, and executions by other owners shall have full effect to the extent of their interests in the property. For purposes of this section, the term "record owner" means any person owning a present or future interest of record in the real property which would be affected by the lien of the mortgage or deed of trust, but does not mean the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or any other lien or security interest in the real property.

(d) The certificate described in subsection (c) of this section may be in any form that fulfills the requirements of subsection (c) of this section, including the following:

"Certificate of Extension of Period for Advances Under Home Equity Line of Credit

Please take notice that the borrower and lender under the home equity line of credit secured by the (deed of trust) (mortgage) recorded on ________________ in Book ________, at Page ________, records of this County, have agreed to extend the period within which the borrower may request advances as set forth in G.S. 45-82.1. The borrower's obligations to repay advances and related undertakings are secured by the (deed of trust) (mortgage).

WITNESS the signatures and seals of the undersigned, this ________ day of ________, ________.

________________________________ (SEAL)
(Grantor (s))
________________________________ (SEAL)
Other record owner(s)
________________________________ (SEAL)
(Mortgagee or Beneficiary)

(Acknowledgment as required by law)." (1995, c. 237, s. 2.)

Editor's Note. — Session Laws 1995, c. 237, s. 3, made this section effective October 1, 1995.

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Sec.
46-3. Petition by cotenant or personal representative of cotenant.
46-10. Commissioners to meet and make partition; equalizing shares.

Article 2.

Partition Sales of Real Property.

Sec.
46-22. Sale in lieu of partition.
46-28. Sale procedure.
46-28.1. Petition for revocation of confirmation order.
46-28.2. When bidder may purchase.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in an action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Superior court had no authority to partition marital property pursuant to the provisions of this section where the jurisdiction of the district court had been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Dismissal of Appeal Held Error. — Where petitioners excepted to the commissioners' report under § 46-19, the trial court did not have the authority to dismiss the appeal due to petitioners failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

Cited in McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993).

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

CASE NOTES

I. In General.

I. IN GENERAL.

Jurisdiction of Superior Court. — Where petitioner tried but failed to invoke the jurisdiction of the district court for equitable distribution of the parties' marital property the superior court had subject matter jurisdiction to hear the proceeding for the partition of the subject property. Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873, cert. denied, 338 N.C. 515, 452 S.E.2d 809 (1994).

§ 46-7. Commissioners appointed.

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-10. Commissioners to meet and make partition; equalizing shares.

The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C.S., s. 3222; 1995, c. 379, s. 14(b).)

Effect of Amendments. — The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, deleted "or any constable" following "sheriff".

CASE NOTES

Cited in Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

Petitioners Not Required to State Specific Grounds. — Where petitioners excepted to the commissioners' report under this section, the trial court did not have the authority to dismiss the appeal due to petitioners' failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Failure of Court to Make Required Findings. — Where the trial court failed to make the findings of fact required by this section for partition by sale, that actual partition would result in one cotenant's share having less value than the share he would receive were the property partitioned by sale, and that actual partition would materially impair a cotenant's rights, since there was also no evidence in the record which would support such findings, the trial court's order of partition by sale was reversed. Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993).

Cited in Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7.)

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.
(2) In the case of any party to the partition proceeding:
  a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or
  b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or
  c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and
(2) The purchaser has not agreed in writing to assume the lien; and
(3) The lien will not be satisfied out of the proceeds of the sale; and
(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale pursuant to the provisions of G.S. 1-339.27. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7.)

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.
47-3. [Repealed.]
47-7, 47-8. [Repealed.]
47-8.1. Certain documents verified by attorneys validated.
47-15. [Repealed.]

Article 2.

Registration.

47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.
47-18.1. Registration of certificate of corporate merger or consolidation.
47-18.2. Registration of Inheritance and Estate Tax Waiver.
47-18.3. Execution of corporate instruments; authority and proof.
47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.
47-29.1. Recordation of waste disposal on land.
47-30. Plats and subdivisions; mapping requirements.
47-31. Certified copies may be registered; used as evidence.
47-32. Photographic copies of plats, etc.
47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.
47-36.1. Correction of errors in recorded instruments.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

47-41. [Repealed.]
47-41.01. Corporate conveyances.
47-41.02. Other forms of probate for corporate conveyances.
47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.
47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.
47-46.3. Affidavit of lost note.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

Sec.
47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.
47-50. Order of registration omitted.
47-51. Official deeds omitting seals.
47-53. Probates omitting official seals, etc.
47-53.1. Acknowledgment omitting seal of notary public.
47-54.1. Registration by register's assistants or deputies.
47-71.1. Corporate seal omitted prior to January 1, 1991.
47-100. Acknowledgments taken by officer who was grantor.
47-108.5. Validation of certain deeds executed in other states where seal omitted.
47-108.11. Validation of recorded instruments where seals have been omitted.
47-108.20. Validation of certain recorded instruments that were not acknowledged.
47-108.21. Sales for 1930 on dates other than first Monday in June validated.
47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.
47-108.23. Tax sales for 1933-34 and certificates validated.
47-108.24. Notices of sale for taxes by publication validated.
47-108.25. Validation of sales and resales held pursuant to § 105-374.
47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

47-112. Forgery or alteration of discharge or certificate; punishment.

Article 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

Sec.
47-115.1. [Repealed.]

ARTICLE 1.

Probate.

§ 47-3: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-7: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-8: Repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-8.1. Certain documents verified by attorneys validated.

Final judgments otherwise proper, entered in actions or proceedings in which the complaints or any other documents were verified in violation of G.S. 47-8 prior to its repeal shall not be void or voidable. (1991, c. 543, s. 2.)

Editor's Note. — Session Laws 1991, c. 543, s. 4 made this section effective upon ratification. This section was ratified July 4, 1991.

Section 47-8 referred to in this section, was repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-14.1. Repeal of laws requiring private examination of married women.

CASE NOTES

Cited in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Local Modification. — (As to Article 2) Mitchell: 1987, c. 537.

§ 47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.

It shall not be necessary in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, to record a written assignment in the office of the register of deeds in the county in which the real property is located. A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. The provisions of this section do not preclude the recordation of a written assignment of a deed of trust, mortgage, or other security instrument, with or without the promissory note or other instrument that it secures, provided that the assignment complies with applicable law. (1993, c. 288, s. 4.)

Editor's Note. — Session Laws 1993, c. 288, s. 4, made this section effective upon ratification. The act was ratified July 6, 1993, and applies to assignments made on or after that date.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

Legal Periodicals. —

For article, "Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases," see 14 Campbell L. Rev. 275 (1993).

CASE NOTES

I. In General.
III. What Instruments Affected.
IV. Persons Protected and Rights Thereof.
V. Notice.

I. IN GENERAL.

This section and § 47-20, etc. — The recording statute for deeds of trust, § 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

This section and § 47-20 are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

The purpose of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Title Examiner Must Read Prior Conveyances. — In title examination when checking the grantor's out conveyances, it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Principles applicable to sufficiency of references, etc. — In accord with the main volume. See Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Rents Already Accrued and Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Applied in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 79 N.C. App. 187, 339 S.E.2d 26 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990); In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

III. WHAT INSTRUMENTS AFFECTED.

Parol and Implied Trusts, etc. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

IV. PERSONS PROTECTED AND RIGHTS THEREOF.

State's Title Superior Where Intervenor's Interest Derived from Deed Recorded After Filing of Lis Pendens. — Since the State's title to property derived from a Racketeer Influenced and Corrupt Organizations Act forfeiture proceeding related back to the date of the institution of the action when the notice of lis pendens was filed pursuant to § 75D-5, the State's title was superior to the interest of an intervenor which derived from a deed from her husband recorded after the institution of the RICO action, and after the filing of the notice of lis pendens. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Creditors Put Upon Same Plane as Purchasers. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

V. NOTICE.

A purchaser has constructive notice of all duly recorded documents that a proper examination of the title should reveal. Stegall v. Robinson, 81 N.C. App 617, 344 S.E.2d 803 (1986).

Actual Knowledge Not Sufficient Notice of Restrictive Covenant. — It is well settled in the state that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title. Unlike in many states, actual knowledge, no matter how full and formal, is not sufficient to bind a purchaser in the state with notice of the existence of a restrictive covenant. Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 177 (1992).

Notice of Restrictive Covenants Recorded with First Conveyance of Subdivision Lots. — Defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat, but were recorded with the first conveyance out of lots in the subdivision. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

§ 47-18.1. Registration of certificate of corporate merger or consolidation.

(a) If title to real property in this State is transferred by operation of law upon the merger or consolidation of two or more corporations, such transfer is effective against lien creditors or purchasers for a valuable consideration from the corporation formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger or consolidation, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification. If the corporation involved is not a domestic corporation, a similar certificate by any competent authority in the jurisdiction of incorporation may be registered in accordance with this section.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the corporation formerly owning the property shall appear in the "Grantor" index, and the name of the corporation owning the property by virtue of the merger or consolidation shall appear in the "Grantee" index. (1967, c. 950, s. 3; 1991, c. 645, s. 2(b).)

§ 47-18.2. Registration of Inheritance and Estate Tax Waiver.

An Inheritance and Estate Tax Waiver or other consent to transfer issued by the Secretary of Revenue bearing the signature of the Secretary of Revenue or the official facsimile signature of the Secretary of Revenue may be registered by the Register of Deeds in the county or counties where the real estate described in the Inheritance and Estate Tax Waiver or consent to transfer is located in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by an officer shall be required. The name of the decedent owning the real property at death shall appear in the "Grantor" index. Nothing herein shall require a personal representative or other person interested in the decedent's estate to register Inheritance and Estate Tax Waivers or consents to transfer. (1987, c. 548, s. 3.)

Editor's Note. — Session Laws 1987, c. 548, s. 4 made this section effective upon ratification. The act was ratified July 3, 1987.

§ 47-18.3. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the bylaws or articles of incorporation, when it appears on the face of an instrument registered in the office of the register of deeds that the instrument was signed in the ordinary course of business on behalf of a domestic or foreign corporation by its chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, and attested or countersigned by another person who is its secretary or an assistant secretary, (or, in the case of a bank, its secretary, assistant secretary, cashier, or assistant cashier), such an instrument shall be as valid with respect to the rights of innocent third parties as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The subsection shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation.

(b) Any instrument registered in the office of the register of deeds, appearing on its face to be executed by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, is prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that the instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, and that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(c) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, inherent or apparent authority, ratification, estoppel, or otherwise.

(d) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(e) The Home Owners Loan Corporation or any corporation, the majority of whose stock is owned by the United States government, may convey lands or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution, under seal, of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1991, c. 647, s. 2.)

Editor's Note. — Session Laws 1991, c. 647, which enacted this section, in section 7 provides: "Sections 1 and 2 of this act are effective July 1, 1990, but shall not apply in any action or proceeding filed on or after July 1, 1990, and before the ratification of this act." The act was ratified on July 12, 1991.

§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section.

(b) For purposes of this section and G.S. 47-20.1, the following definitions apply:

(1) "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-109(3), timber, the proceeds from the sale of farm products or timber, or the proceeds from the recovery or severance of any mineral deposits located on or under real property.

(2) "Assignment of leases, rents, issues, or profits" means every document assigning, transferring, pledging, mortgaging, or conveying an interest in leases, licenses to real property,

and rents, issues, or profits arising from real property, whether set forth in a separate instrument or contained in a mortgage, deed of trust, conditional sales contract, or other deed or instrument of conveyance.

(3) "Collateral assignment" means any assignment of leases, rents, issues, or profits made and delivered in connection with the grant of any mortgage, or the execution of any conditional sales contract or deed of trust or in connection with any extension of credit made against the security of any interest in real property, where the assignor retains the right to collect or to apply such lease revenues, rents, issues, or profits after assignment and prior to default.

(c) The recording of a written document in accordance with G.S. 47-20.1 containing an assignment of leases, rents, issues, or profits arising from real property shall be valid and enforceable from the time of recording to pass the interest granted, pledged, assigned, or transferred as against the assignor, and shall be perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor.

(d) Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, deed of trust, conditional sales contract, or evidence of indebtedness which such assignment secures, the assignee shall thereafter be entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee shall be entitled to notify the tenant or other obligor to make payment to him and shall also be entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

(e) This section shall not exclude other methods of creating, perfecting, collecting, sequestering, or enforcing a security interest in rents, issues, or profits provided by the law of this State. (1829, c. 20; R.C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C.S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5; 1991, c. 234, s. 1.)

Editor's Note. — Session Laws 1991, c. 234, s. 1, amended this section effective October 1, 1991, and applicable to all assignments of leases, rents, issues, or profits, including collateral assignments, whether recorded prior to or after October 1, 1991.

CASE NOTES

I. In General.
II. Registration as Between Parties.
III. Persons Protected.
IV. Notice.

I. IN GENERAL.

The object of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit

Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

The purpose of this section is to prevent fraud, and liens registered under this Article are still subject to the common law of North Carolina for determination of their validity. The statute merely adds an additional requirement that a mortgagee must meet before successfully asserting an interest in rents and profits of a mortgaged property against third parties. It is designed to protect third parties. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

Section Intended Primarily to Protect, etc. —

The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

This section is merely a recording statute that serves to protect third parties by giving record notice of a purported interest. Recordation does not serve to add to the substantive rights of a purported lien holder. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

No distinction is made, etc. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Construction of This Section and § 47-18, etc. —

This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, § 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Anyone at any time can register papers in compliance with this section, but such recordation does not create a perfected security interest. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

Recordation Necessary to Perfect Security Interest in Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Applied in In re Blanks, 64 Bankr. 467 (Bankr. E.D.N.C. 1986).

Cited in In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990).

II. REGISTRATION AS BETWEEN PARTIES.

Defendant was not a "party" to deed of trust for purposes of the rule that as between parties the instrument first executed, rather than the one first registered, has lien priority, where she signed the instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Inapplicability of Registration Statutes to Parol and Constructive Trusts. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

III. PERSONS PROTECTED.

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. &

Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

IV. NOTICE.

Sections Not Mere Notice Statutes for Protection of Third Parties. — Section 47-18 and this section are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

No Mere Notice, etc. — In accord with the main volume. See Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The "witness" exception to the recordation requirement is not applicable in this jurisdiction. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Cited in Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.2. Place of registration; personal property.

Legal Periodicals. — For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-26. Deeds of gift.

CASE NOTES

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Cited in Hayes v. Turner, 98 N.C. App. 451, 391 S.E.2d 513 (1990).

§ 47-27. Deeds of easements.

CASE NOTES

Applicability to Board of Transportation. — In accord with second paragraph in the main volume. DOT v. Auten, 106 N.C. App. 489, 417 S.E.2d 299 (1992).

Applicability to Department of Transportation. — This section, which governs deeds for rights-of-way and easements, provides that the Department of Transportation does not have to record such interests in land which were acquired prior to July 1, 1959. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

Where a property interest spans more than one county, it is only effective against other claimants in the counties in which it has been recorded. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Race to the Courthouse. — As North Carolina is a pure race jurisdiction, where defendants failed to register their grant of easement in Person County before plaintiffs registered their deed there, plaintiffs won the "race to the courthouse," and their interest superseded the later-recorded interest claimed by defendants. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Purchaser for Value. — North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser." A "purchaser for value" or a "purchaser for valuable consideration" is simply defined as one who has paid a valuable consideration for the execution of an instrument of conveyance. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

§ 47-29.1. Recordation of waste disposal on land.

(a) **(See editor's note)** A permit for the disposal of waste on land shall be recorded as provided in G.S. 130A-301. The disposal of demolition debris in an on-site landfill having a disposal area of one acre or less shall be recorded as provided in G.S. 130A-301.2.

(b) An inactive hazardous substance or waste disposal site shall be recorded as provided in G.S. 130A-310.8. (1995, c. 502, s. 2.1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 502, s. 2.1 having been § 47-28.

Session Laws 1995, c. 502, which enacted this section effective July 28, 1995, in s. 4 provides that the second sentence of subsection (a) expires June 30, 2001.

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;

(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or

(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat" and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use.

(c) Information Contained in Title of Plat. — The title of each plat shall contain the following information: property designation, name of owner (the name of owner shall be shown for indexing purposes only and is not to be construed as title certification), location to include township, county and state, the date or dates the survey was made; scale or scale ratio in words or figures and bar graph; name and address of surveyor or firm preparing the plat.

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision such survey or such plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the registered land surveyor preparing the plat. All plats to be recorded shall be probated as required by law for the registration of deeds. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, ..., certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book ...., page ...., etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book ...., page ....; that the ratio of precision as calculated is 1: ....; that this plat was prepared in accordance with G.S. 47-30 as amended. Witness my original signature, registration number and seal this ...... day of ...., A.D., 19....

....

Seal or Stamp

Surveyor

....

Registration Number"

The certificate of the Notary shall read as follows:

"North Carolina, ... County.

I, a Notary Public of the County and State aforesaid, certify that ...., a registered land surveyor, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this ...... day of ......, 19.....

....

Seal or Stamp

Notary Public

My Commission expires ...."

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of such inaccessible areas when such areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) such index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines

indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where such monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of said monument are on file in the North Carolina Department of Environment, Health, and Natural Resources, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27," indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in such portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. That the survey is of an existing parcel or parcels of land;

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of his or her professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — For purposes of recording, the register of deeds shall not be responsible for:

(1) The provisions of subsection (b), as to archival;

(2) The provisions of subsection (d), except for the notary certificate;

(3) The provisions of subsection (e); or

(4) The provisions of subdivisions (2) through (9) of subsection (f).

A plat, when proven and probated as provided herein for deeds and other conveyances, when presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina. Where local law is in conflict with this section, the provisions in this section shall apply. Failure of a plat to conform in all requirements of this statute shall be sufficient grounds for the register of deeds to refuse to accept the plat for recordation.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136.

(m) Except as provided in subsection (n), any map submitted for inclusion on the public record, whether submitted alone or attached to a deed or other instrument, shall be prepared by a registered land surveyor. Such a map shall either (i) have an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors or (ii) be a copy of a map, already on file in the public record, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for inclusion in the public record only for illustrative purposes and only if the map is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND NO RELIANCE MAY BE PLACED IN ITS ACCURACY." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2.)

Editor's Note. —

Session Laws 1987, c. 747, s. 25 provides that as used in c. 747, which amended subdivision (*l*), the word "municipality" means a "city" as defined by § 160A-1.

Session Laws 1987, c. 747, s. 26 is a severability clause.

Session Laws 1991 (Reg. Sess., 1992), c. 1030, s. 51.16 provides: "The General Statutes Commission will study the requirements of G.S. 47-30(m) and G.S. 89C-26 to determine whether it is possible to provide for a photographic copy of a map to be attached to a deed or other instrument without requiring an original personal signature and original seal as approved by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors, while still protecting the public and assuring that maps have not been altered prior to submission for recording. The General Statutes Commission shall report its findings and recommendations to the 1993 General Assembly and shall submit its report not later than January 31, 1993 to the President Pro Tempore of the Senate and the Speaker of the House of Representatives."

OPINIONS OF ATTORNEY GENERAL

This section applies only to those maps or plats presented to the Register of Deeds for recording in his office. Whether or not the plat or map should be made to comply with this section and recorded depends on the purpose for which it is to be used. See opinion of Attorney General to Mr. Joe B. Freeman, Register of Deeds, Robeson County, 59 N.C.A.G. 1 (1989).

§ 47-31. Certified copies may be registered; used as evidence.

(a) A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county without further certification pursuant to G.S. 47-14; and the registered or duly certified copy of any deed or writing that has been registered in the county where the land is situate may be given in evidence in any court of the State.

(b) Instruments registered pursuant to this section prior to July 6, 1993 that were not further certified pursuant to G.S. 47-14 at the time of registration are hereby validated. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319; 1993, c. 288, ss. 2, 3.)

Editor's Note. — This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1993, c. 288, s. 3, amended this section effective July 6, 1993, and applicable to assignments made on or after that date, by adding present subsection (b).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

§ 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a Class 3 misdemeanor and upon conviction shall be subject only to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2; 1993, c. 539, s. 408; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 539, s. 408 amended this section effective October 1, 1994, and applicable to offenses occurring on or after that date, by inserting "Class 3" preceding "misdemeanor" and inserting "only" following "shall be subject" in the first paragraph.

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

Session Laws 1987, c. 360, s. 1 amended this section effective June 12, 1987, and applicable to corrections made on or after that date, by inserting the present third sentence.

CASE NOTES

Quoted in Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.

Local Modification. — Martin County: 1987 (Reg. Sess., 1988), c. 925.

§ 47-38. Acknowledgment by grantor.

CASE NOTES

Acknowledgment in Compliance with Section. — An acknowledgment to a will, upon which the name and title of the official taking the acknowledgment and the name of the maker as well as the witness was provided, their personal appearance was ascribed by the phrase "sworn to ... before me", the date and year of the acknowledgment were provided, the notary's signature and her seal were affixed thereto, and the phrase "sworn to and subscribed before me" appeared prominently below the signatures of the maker and witness, substantially conformed to the statutory provisions of this section. In re Hess, 104 N.C. App. 75, 407 S.E.2d 594 (1991).

§ 47-41: Repealed by Session Laws 1991, c. 647, s. 3, effective October 1, 1991.

Cross References. — As to corporate conveyances, see now §§ 47-41.01, 47-41.02.

Editor's Note. — Session Laws, 1991, c. 647, s. 3, which repealed this section, provides: "The provision of G.S. 47-41 shall continue to apply to all instruments executed before the effective date [October 1, 1991] of this section of this act."

§ 47-41.01. Corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the deed or other instrument is executed by the corporation's chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer signing the name of such corporation by him as such officer, is sealed with its common or corporate seal, and is attested by another person who is its secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or, in case of a bank, its secretary, assistant secretary, cashier, or assistant cashier, the following form of acknowledgment is sufficient:

....

(State and county, or other
description of place where
acknowledgment is taken)

I, ..., ...,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)
certify that .... personally came before
(Name of secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
me this day and acknowledged that he (or she) is ....
(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
of ...., a corporation, and that by authority duly
(Name of corporation)
given and as the act of the corporation, the foregoing instrument
was signed in its name by its ....,
(Chairman, president, chief executive officer, vice-president, assistant vice-president, treasurer, or chief financial officer)
sealed with its corporate seal, and attested by himself (or herself) as
its ....
(Secretary, assistant secretary, trust officer, assistant trust officer, cashier or assistant cashier)
My commission expires ....
(Date of expiration of commission as notary public)
Witness my hand and official seal, this the .... day of
...........,
(Month)
....
(Year)
....
(Signature of officer taking acknowledgment)
(Official seal, if officer taking acknowledgment has one)

(1) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(2) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment.

(3) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk, or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered. (1991, c. 647, s. 4.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7, made this section effective October 1, 1991.

§ 47-41.02. Other forms of probate for corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall also be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This ...... day of .... A.D. ...., personally came before me (here give the name and official title of the officer who signs this certificate) A.B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C.D., who is the president (or presiding member or trustee), and also with E.F. and G.H., two other members of said corporation; and that he, the said A.B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this ...... day of .... (year).

(Official seal.)

....

(Signature of officer.)

(c) If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ... County.

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of the officer who signs the certificate) A.B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C.D., who is the president of said corporation, and that he, the said A.B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A.B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A.B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the .... day of ...... (year).

(Official seal.)

....

(Signature of officer.)

North Carolina, ... County.

This is to certify that on the ...... day of ......, 19...., before me personally came .... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ...... is the president (or vice-president), and ...... is the secretary (or assistant secretary) of the ......, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ...... day of ...... (year).

(Official seal.)

....
(Signature of officer.)

(d) If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ...... day of ......, A.D. ...., personally came before me (here give name and official title of officer who signs the certificate) A.B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the ...... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A.B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

....
(Signature of officer.)

(e) All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

(f) The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust, and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina
.... County

I, ..., do hereby certify that ....
(Name of president, secretary or treasurer)
personally came before me this day and acknowledged that he is
.... of .... and acknowledged,
(President, secretary or treasurer) (Name of corporation)
on behalf of ...., the grantor, the due
(Name of corporation)
execution of the foregoing instrument.

Witness my hand and official seal, this ..... day of ....., 19.....
(Official seal)
....
(Title of officer)
....
(Name of state)
....
(County)
I, ...
(Name of officer taking proof) (Official title of officer taking proof)
of ...., certify that
(County) (Name of state)
.... personally appeared before
(Name of subscribing witness)
me, and being duly sworn, stated that in his presence
....
(Name of president, secretary or treasurer of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)

Witness my hand and official seal, this .... day of
................., 19.........
(Month) (Year)
....
(Signature of official taking proof)
....
(Official title of official taking proof)
My commission expires ....
(Date of expiration of official's commission)

(g) All deeds and other conveyances executed on or before April 12, 1974, by the president, any vice-president, assistant vice-president, manager, comptroller, treasurer, assistant treasurer, trust officer or assistant trust officer, or chairman or vice-chairman of a corporation are hereby validated to the extent that such deeds or other conveyances were otherwise properly executed, probated, and recorded. (1991, c. 647, s. 5; 1991 (Reg. Sess., 1992), c. 1030, s. 14.)

Editor's Note. — Session Laws, 1991, c. 647, s. 7 made this section effective October 1, 1991.

§ 47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

The form of a notice of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(5) shall be substantially as follows:

North Carolina, ... County.
I, ... (name of trustee or mortgagee), certify that the debt or other obligation in the amount of .... secured by the (deed of trust) (mortgage) (other instrument) executed by .... (grantor)

(mortgagor), ... (trustee) (leave blank if mortgage), and .... (beneficiary) (mortgagee), and recorded in .... County at .... (book and page) was satisfied on .... (date of satisfaction).

....

(Signature of trustee or mortgagee)

I, ... (name of officer taking acknowledgment), ... (official title of person taking acknowledgment) certify that .... (name of trustee or mortgagee) personally came before me this day and acknowledged the satisfaction of the provisions of the above-referenced (deed of trust) (mortgage) (other instrument).

Witness my hand and official seal this the .... day of .... (month), ... (year).

....

(Signature of officer taking acknowledgment)

My commission expires .... (Date of expiration of official's commission).

North Carolina, ... County.

The foregoing acknowledgment of .... (name of officer that took acknowledgment), ... (official title of person that took acknowledgment), is certified to be correct.

This .... (day) of .... (month), ... (year).

....

(Signature of Register of Deeds).

(1987, c. 405, s. 2; c. 662, s. 4; 1989, c. 434, s. 2.)

Editor's Note. — Session Laws 1987, c. 405, s. 3 made this section effective 30 days after ratification. The act was ratified June 18, 1987.

Session Laws 1989, c. 434, s. 2, amended this section effective retroactively to July 18, 1987 and applicable to all applications for notice of satisfaction of a deed of trust, mortgage, or other instrument made on or after that date.

§ 47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.

The form of a certificate of satisfaction of a deed of trust, mortgage, or other instrument pursuant to G.S. 45-37(a)(6) shall be substantially as follows:

CERTIFICATE OF SATISFACTION

North Carolina, ____________________ County.

I, ____________________ (name of owner of the note or other indebtedness secured by the deed of trust or mortgage), certify that I am the owner of the indebtedness secured by the hereafter described deed of trust or mortgage and that the debt or other obligation in the amount of ____________________ secured by the (deed of trust) (mortgage) (other instrument) executed by ____________________ (grantor) (mortgagor), ____________________ (trustee) (leave blank if mortgage), and ____________________ (beneficiary) (mortgagee), and recorded in ____________ County at ____________ (book and page) was satisfied on ____________ (date of satisfaction). I request that this certificate of satisfaction be recorded and the above-referenced security instrument be canceled of record.

____
(Signature of owner of note)

[Acknowledgment before officer authorized to take acknowledgments]. (1995, c. 292, s. 3.)

Editor's Note. — Session Laws 1995, c. 292, s. 7, made this section effective October 1, 1995.

§ 47-46.3. Affidavit of lost note.

The form of an affidavit of lost note, if required pursuant to G.S. 45-37(a)(6), shall be substantially as follows:

AFFIDAVIT OF LOST NOTE

[Name of affiant] personally appeared before me in ____________ County, State of ____________, and having been duly sworn (or affirmed) made the following affidavit:

1. The affiant is the owner of the note or other indebtedness secured by the deed of trust, mortgage, or other instrument executed by ____________ (grantor, mortgagor), ____________ (trustee), and ____________ (beneficiary, mortgagee), and recorded in ____________ County at ____________ (book and page); and
2. The note or other indebtedness has been lost and after the exercise of due diligence cannot be located.
3. The affiant certifies that all indebtedness secured by the deed of trust, mortgage, or other instrument has been satisfied and the affiant is responsible for cancellation of the same.

____
(Signature of affiant)

Sworn to (or affirmed) and subscribed before me this ____________ day of ____________, 19 ____.

[Signature and seal of notary public or other official authorized to administer oaths]. (1995, c. 292, s. 4.)

Editor's Note. — Session Laws 1995, c. 292, s.7, made this section effective October 1, 1995.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to April 1, 1980. (1917, c. 237; C.S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11; 1973, c. 1402; 1987, c. 360, s. 2.)

Editor's Note. — Session Laws 1987, c. 360, s. 2, amended this section effective June 12, 1987, and applicable to corrections made on or after that date, by substituting "April 1, 1980" for "April 1, 1974" at the end of the section.

§ 47-50. Order of registration omitted.

In all cases prior to December 31, 1992, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C.S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79; 1981, c. 812; 1993, c. 80, s. 1.)

Editor's Note. — Session Laws 1993, c. 80, s. 2, provides that the act does not affect litigation pending on ratification (May 25, 1993).

§ 47-51. Official deeds omitting seals.

All deeds executed prior to January 1, 1991, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2; 1987, c. 277, s. 2; 1989, c. 390, s. 2; 1991, c. 489, s. 2.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January 1, 1991: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3; 1987, c. 277, s. 3; 1989, c. 390, s. 3; 1991, c. 489, s. 3.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11:

"This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-53.1. Acknowledgment omitting seal of notary public.

Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to January 1, 1991. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4; 1987, c. 277, s. 4; 1989, c. 390, s. 4; 1991, c. 489, s. 4.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-54.1. Registration by register's assistants or deputies.

All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's assistant or deputy, and signed in the name of the register of deeds by the assistant or deputy, and initialed by the assistant or deputy, instead of being signed by them as assistant or deputy, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed by the assistant or deputy in the respective capacity. (1991 (Reg. Sess., 1992), c. 877, s. 1.)

Editor's Note. — Session Laws 1991 (Reg. Sess., 1992), c. 877, s. 2 made this section effective upon ratification. The act was ratified July 7, 1992.

§ 47-71.1. Corporate seal omitted prior to January 1, 1991.

Any corporate deed, or conveyance of land in this State, made prior to January 1, 1991, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5; 1987, c. 277, s. 5; 1989, c. 390, s. 5; 1991, c. 489, s. 5.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11:

"This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-100. Acknowledgments taken by officer who was grantor.

In all cases where a deed or deeds dated prior to the first day of January, 1980, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1980, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986; 1991 (Reg. Sess., 1992), c. 1030, s. 51.8.)

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to January 1, 1991, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6; 1987, c. 277, s. 6; 1989, c. 390, s. 6; 1991, c. 489, s. 6.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1995 or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7; 1987, c. 277, s. 7; 1989, c. 390, s. 7; 1991, c. 489, s. 7; 1995, c. 163, s. 16.)

Editor's Note. —

Session Laws 1985, c. 70, which amended this section, provided in s. 8 that the act was effective upon ratification (April 10, 1985) and would not affect pending litigation.

Session Laws 1987, c. 277, which amended this section, provided in s. 11: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. — The 1995 amendment, effective June 5, 1995, substituted "January 1, 1995" for "January 1, 1991" in the last paragraph.

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 made this section effective upon ratification and provided that it would not affect pending litigation. The act was ratified June 30, 1986.

§ 47-108.21. Sales for 1930 on dates other than first Monday in June validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year of 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-387. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-388. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.23. Tax sales for 1933-34 and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-389. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.24. Notices of sale for taxes by publication validated.

All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-390. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.25. Validation of sales and resales held pursuant to § 105-374.

All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-391. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Sections 1-327 and 1-328, referred to in this section, were repealed by Session Laws 1949, c. 719, s. 2. Section 45-28, referred to in this section, was repealed by Session Laws 1949, c. 720, s. 5.

§ 47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-392. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

ARTICLE 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-112. Forgery or alteration of discharge or certificate; punishment.

Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1921, c. 198, s. 4; C.S., s. 3366(n); 1993, c. 539, s. 409; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court".

ARTICLE 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2, effective October 1, 1983.

Cross References. — As to powers of attorney, see now § 32A-1 et seq. As to effect of powers of attorney executed pursuant to § 47-115.1 prior to October 1, 1983, see § 32A-14.

Chapter 47A.

Unit Ownership.

Article 1.

Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

§ 47A-2. Declaration creating unit ownership; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-3. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

§ 47A-4. Property subject to Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-5. Nature and incidents of unit ownership.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-8. Use of common areas and facilities.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Incorporated condominium homeowners' association lacked standing to sue in its own name to enforce various restrictions on activity at the condominiums. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

To receive preliminary injunction, plaintiff must show likelihood of success on merits and some type of irreparable harm. This standard, however, does not require showing that injury is beyond repair, but that injury is one to which complainant should not be required to submit or other party permitted to inflict. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Decision by trial court to issue or deny injunction will be upheld if there is ample competent evidence to support decision, even though evidence may be conflicting and appellate court could substitute its own findings. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history

and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986); Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-18. Bylaws; annexed to declaration; amendments.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-19. Bylaws; contents.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The bylaws must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-21. Units taxed separately.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-28. Persons subject to Article, declaration and bylaws; effect of decisions of association of unit owners.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

Article 2.

Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Chapter 47B.

Real Property Marketable Title Act.

Sec.
47B-3. Exceptions.

§ 47B-1. Declaration of policy and statement of purpose.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986); Younce v. United States, 661 F. Supp. 482 (W.D.N.C. 1987); Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989).

Cited in Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992).

§ 47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracts. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for any one of the following purposes:

  a. Flowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist.

  b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

  c. Conserving land or water areas pursuant to a conservation agreement or preserving a structure or site pursuant to a preservation agreement under Article 4 of Chapter 121 of the General Statutes.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B. (1973, c. 255, s. 1; 1995, c. 443, s. 3.)

Effect of Amendments. — The 1995 amendment, effective July 18, 1995, in subdivision (8) substituted "any one of the following purposes" for "the purpose of" in the introductory language, deleted "or" at the end of subdivision (8)a., added subdivision (8)c., and made punctuation changes.

Legal Periodicals. —

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

Chapter 47C.

North Carolina Condominium Act.

Article 1.

General Provisions.

Sec.
47C-1-102. Applicability.

Article 2.

Creation, Alteration, and Termination of Condominiums.

Sec.
47C-2-109. Plats and plans.

ARTICLE 1.

General Provisions.

§ 47C-1-102. Applicability.

(a) This chapter applies to all condominiums created within this State after October 1, 1986. Sections 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-107A (Charges for Late Payment, Fines), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State on or before October 1, 1986; but those sections apply only with respect to events and circumstances occurring after October 1, 1986 and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

(b) The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (G.S. 47C-4-102 through 47C-4-108) apply to all contracts for the dispositions thereof signed in this State by any party unless exempt under G.S. 47C-4-101(b). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1995, c. 509, s. 135.1(h).)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "47C-3-107A (Charges for Late Payment, Fines)" in subsection (a); and inserted "on or" preceding "before October 1, 1986" in subsections (a) and (b).

§ 47C-1-103. Definitions.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

Article 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-105. Contents of declaration.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-109. Plats and plans.

(a) The declarant shall file with the register of deeds in each county where the condominium is located the condominium's plat or plan prepared in accordance with this section. The plat or plan shall be considered a part of the declaration but shall be recorded separately, and the declaration shall refer by number to the file where such plat or plan is recorded. Each plat or plan shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to be recorded, numbered serially in the order of receipt, and designated "Condominium" with the name of the building, if any, and shall contain a reference to the book and page numbers and date of the recording of the declaration. Each plat or plan must contain a certification by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes that it contains all of the information required by this section.

(b) Each plat or plan or combination thereof must show:

(1) The name and a survey or general schematic map of the entire condominium;

(2) The location and dimensions of all real estate not subject to development rights or subject only to the development right to withdraw and the location and dimensions of all existing improvements within that real estate;

(3) The location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) The extent of any encroachments by or upon any portion of the condominium;

(5) The location and dimensions of all easements having specific location and dimensions and serving or burdening any portion of the condominium;

(6) The verified statement of an architect licensed under the provisions of Chapter 83A of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes certifying that such plats or plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built;

(6a) The certificate by a registered land surveyor licensed under the provisions of Chapter 89C of the General Statutes stating that the plats or plans accurately depict the legal boundaries and the physical location of the units and other improvements relative to those boundaries;

(7) The locations and dimensions of limited common elements; however, parking spaces and the limited common elements described in subsections 47C-2-102(2) and (4) need not be shown, except for decks, stoops, porches, balconies, and patios;

(8) A legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) The distance between noncontiguous parcels of real estate comprising the condominium;

(10) Any unit in which the declarant has reserved the right to create additional units or common elements.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (c) or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(e) In order to be recorded, plats or plans filed shall:

(1) Be reproducible plats or plans on cloth, linen, film, or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings or suitable scale to assure legibility require, plats or plans may be placed on two or more sheets with appropriate match lines.

(f) The fee for recording each plat or plan sheet submitted shall be as prescribed by G.S. 161-10(a)(3). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1987, c. 282, s. 8; 1989, c. 571.)

Editor's Note. — Session Laws 1989, c. 571, amended this section effective October 1, 1989 and applicable to all plats and plans filed with the register of deeds on or after that date, by adding subdivision (b)(6a).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-110. Exercise of development rights.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

ARTICLE 3.

Management of the Condominium.

§ 47C-3-102. Powers of unit owners' association.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-105. Termination of contracts and leases of declarant.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-112. Conveyance or encumbrance of common elements.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-115. Assessments for common expense.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-116. Lien for assessments.

CASE NOTES

Fine for Each Day of Continued Violation. — Board of directors of homeowners association did not exceed its authority in levying a fine of $100 for each day plaintiff continued in violation of condominium rule, by altering the outside of her home. Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995).

§ 47C-3-117. Other liens affecting the condominium.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 4.

Protection of Purchasers.

§ 47C-4-110. Escrow of deposits.

CASE NOTES

Evidence Regarding Requirement. — Deposit money given to reserve a condominium unit under this section was still rightfully owned by the purchaser were required to be placed in escrow. It follows that it was not error for the trial judge to deny defendant's motion in limine to exclude evidence indicating such a requirement. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Testimony Regarding Absence of Criminal Sanctions. — Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of this section is not subject to criminal sanctions. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

§ 47C-4-114. Implied warranties of quality.

Legal Periodicals. — For comment, "From Caveat Emptor to Consumer Equity — The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act," see 27 Wake Forest L. Rev. 571 (1992).

Chapter 48.

Adoptions.

[Repealed effective July 1, 1996.]

Sec.
48-2. [Repealed effective July 1, 1996.]
48-3. (Repealed effective July 1, 1996) What minor children may be adopted; notice required before a child's placement; violation a misdemeanor; investigation.
48-3.1. [Repealed effective July 1, 1996.]
48-4. (Repealed effective July 1, 1996) Who may adopt children.
48-5 through 48-8. [Repealed effective July 1, 1996.]
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48-12. (Repealed effective July 1, 1996) Nature of proceeding; venue.
48-13, 48-14. [Repealed effective July 1, 1996.]
48-15. (Repealed effective July 1, 1996) Petition for adoption.
48-16. [Repealed effective July 1, 1996.]
48-19. [Repealed effective July 1, 1996.]
48-21. [Repealed effective July 1, 1996.]
48-24. [Repealed effective July 1, 1996.]
48-25. (Repealed effective July 1, 1996) Record and information not to be made public; violation a misdemeanor.
Sec.
48-26. (Repealed effective July 1, 1996) Procedure for opening record for necessary information.
48-27. [Repealed effective July 1, 1996.]
48-28. (Repealed effective July 1, 1996) Questioning validity of adoption proceeding.
48-29 through 48-35. [Repealed effective July 1, 1996.]
48-36. (Repealed effective July 1, 1996) Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.
48-37. (Repealed effective July 1, 1996) Compensation for placing or arranging placement of child for adoption prohibited.
48-38. (Repealed effective July 1, 1996) Advertisements soliciting children for adoption prohibited.

Editor's Note. — Session Laws 1995, c. 457 repeals this Chapter effective July 1, 1996, and adds a new Chapter 48. Section 11 of c. 457 provides that nothing in the act shall affect the validity of an adoption completed or validated under any prior law. Section 12 of c. 457 provides that any petition for adoption filed prior to and still pending on July 1, 1996, shall be completed in accordance with the law in effect immediately prior to July 1, 1996.

§ 48-1. (Repealed effective July 1, 1996) Legislative intent; construction of Chapter.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Cited in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 48-2: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-3. (Repealed effective July 1, 1996) What minor children may be adopted; notice required before a child's placement; violation a misdemeanor; investigation.

(a) Any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States, may be adopted in accordance with the provisions of this Chapter.

(b) No less than 72 hours before any child less than 12 years old may be placed with any person in anticipation of an adoption, the director of social services of the county in which the parent or guardian resides or the county in which the child was born or will be born shall be notified in writing of the proposed placement. The written notification shall be sent by the prospective adoptive parents and shall contain:

(1) The names and addresses of each parent or guardian of the child and of each person with whom the child is to be placed for adoption,
(2) The signatures of a parent or guardian of the child and of each person with whom the child is to be placed for adoption,
(3) The birth date or expected birth date and county of birth or expected county of birth of the child, and
(4) The intention of the parties as to adoption of the child.

The notification may also contain any request for counseling that any of the parties to the placement wish to make.

The requirement of notification does not apply to placements with a child's relative listed in G.S. 48-21.

Any person who willfully and knowingly violates this subsection shall be guilty of a Class 1 misdemeanor.

(c) Promptly upon receipt of notification under subsection (b), the director shall investigate the proposed adoptive placement. The director may waive an investigation if circumstances warrant, or, in making an investigation, may rely on information already known to the department. If the director determines that the proposed placement appears to be contrary to the child's welfare, the director shall promptly notify all the parties to the proposed placement. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1; 1993, c. 539, s. 410; 1994, Ex. Sess., c. 24, s. 14(c).)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the fourth paragraph of subsection (b).

CASE NOTES

Applied in In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

§ 48-3.1: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-4. (Repealed effective July 1, 1996) Who may adopt children.

(a) Any person over 18 years of age may petition in a special proceeding in the district court to adopt a minor child and may also petition for a change of the name of such child. If the petitioner has a husband or wife living, competent to join in the petition, such spouse shall join in the petition.

(b) Provided, however, that if the spouse of the petitioner is a biological parent of the child to be adopted, such spouse need not join in the petition but need only to give consent as provided in G.S. 48-7(d). Provided further that if the petitioner is the biological parent of the child to be adopted and the other biological parent of the child is living, the spouse of the petitioner may choose not to join in the petition, but shall indicate agreement to the proposed adoption by affidavit which shall be incorporated into the adoption proceeding.

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for six months next preceding the filing of the petition unless the petition is for the adoption of a stepchild as provided in subsection (b) or for the adoption of a natural child as provided in subsection (b) or for the adoption of a child who is by blood the grandchild of one of the petitioners, or unless, in the case of a child born out of wedlock, the petitioners file an affidavit with the court as described in subsection (d). In cases where the petition is for the adoption of a child who is by blood the grandchild of one of the petitioners and in cases where the petitioner is the biological parent of the child as provided in subsection (b) and in the case of a child born out of wedlock and where the petitioners file an affidavit with the court as described in subsection (d) and in cases where the petition is for the adoption of a stepchild, the petitioner must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. The provisions of this subsection concerning the adoption of a grandchild shall apply in the case of any petition filed on or after January 1, 1967.

(d) In the case of a child born out of wedlock, if the putative father of the child or the putative father and his spouse are petitioners seeking to adopt the child, and the petitioners shall state in an

§ 48-4 has a delayed repeal date. See notes.

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affidavit filed with the court that the male petitioner is the father of the child or that he is believed by the petitioners to be the father of the child, and that the child was born out of wedlock, and the petitioners must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed.

(e) If the petitioner is the biological parent or the spouse of the biological parent of the minor child, such petitioner may adopt the child even though the petitioner is not 18 years of age. Such petitioner shall be competent to execute the petition without the appointment of a general or testamentary guardian, or by guardian ad litem. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693; 1971, c. 395; c. 1231, s. 1; 1973, c. 1354, ss. 1-4; 1979, c. 107, s. 6; 1983, c. 454, s. 6; 1995, c. 88, s. 3.)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to adoption petitions filed on or after that date, substituted "district court" for "superior court" in subsection (a).

§§ 48-5 through 48-8: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Sections Repealed Effective July 1, 1996. These sections are repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For these sections as in effect until July 1, 1996, see the main pamphlet.

§ 48-9. (Repealed effective July 1, 1996) When consent may be given by persons other than parents.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Cited in In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); Swing v. Garrison, 112 N.C. App. 818, 436 S.E.2d 895 (1993).

§ 48-9.1. (Repealed effective July 1, 1996) Additional effects of surrender and consent given to director of social services or to licensed child-placing agency; custody of child; disposition of certain children with special needs.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 25.46 provides: "Effective October 1, 1994, the Department of Human Resources shall provide Medicaid coverage for adoptive children with special or rehabilitative needs regardless of the adoptive family's income."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

§§ 48-9.2, 48-10: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Sections Repealed Effective July 1, 1996. These sections are repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For these sections as in effect until July 1, 1996, see the main pamphlet.

§ 48-11. (Repealed effective July 1, 1996) Consent not revocable.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Cited in Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993).

§ 48-12. (Repealed effective July 1, 1996) Nature of proceeding; venue.

(a) Adoption shall be by a special proceeding before the clerk of the superior court. The petition may be filed in the county:

(1) Where the petitioners reside; or
(2) Where the child resides; or
(3) Where the child resided when it became a public charge; or
(4) In which is located any licensed child-placing agency or institution operating under the laws of this State and having custody of the child or to which the child shall have been surrendered as provided in G.S. 48-9.

(b) The petition may be filed and the proceeding may be completed in any other county unless a parent or guardian of the person or other person having actual or legal custody of the child to be adopted shall file a written objection with the clerk within 30 days after the filing of the petition for adoption or within 30 days after the completion of any notice required by this Chapter to be given to the person filing such objection.

(c) In the event of the filing of an objection in accordance with subsection (b), venue shall thenceforth be as described in subsection (a) and the clerk shall transmit forthwith all documents, reports and papers on file or thereafter filed with him concerning the proceeding to such clerk of court as shall be designated in writing by the petitioner or petitioners. The status of the proceeding then shall be for all purposes the same as if all things done in the proceeding had

§ 48-12 has a delayed repeal date. See notes.

been done in the court of adoptions to which the proceeding has been removed in accordance with this subsection.

(d) If the child who is the subject of the adoption is also the subject of a pending district court case or proceeding under Chapter 7A of the General Statutes, then the district court having jurisdiction under Chapter 7A shall retain jurisdiction until the final order of adoption is entered. (1949, c. 300; 1971, c. 233, s. 1; 1995, c. 88, s. 4.)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to adoption petitions filed on or after that date, added subsection (d).

CASE NOTES

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, — N.C. App. —, 454 S.E.2d 693 (1995).

Stated in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§§ 48-13, 48-14: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Sections Repealed Effective July 1, 1996. These sections are repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For these sections as in effect until July 1, 1996, see the main pamphlet.

§ 48-15. (Repealed effective July 1, 1996) Petition for adoption.

(a) The caption of the petition shall be substantially as follows:

STATE OF NORTH CAROLINA
IN THE DISTRICT COURT
.... COUNTY
BEFORE THE CLERK

....
(Full name of adopting father)
and
....
(Full name of adopting mother)
FOR THE ADOPTION OF
....
(Full name of child as used in proceeding)

PETITION FOR ADOPTION

(b) The petition may be prepared on a standard form to be supplied by the Department of Human Resources, or may be typewritten, giving all the information hereinafter required.

(c) Such petition must state:

(1) The full names of the petitioners;

§ 48-15 has a delayed repeal date. See notes.

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(2) The information necessary to show that the court to which the petition is addressed has jurisdiction;
(3) When the petitioners acquired custody of the child, and from what person or agency;
(4) The birth date and state or county of birth of the child, if known;
(5) The name used for the child in the proceeding;
(6) That it is the desire of the petitioners that the relationship of parent and child be established between them and said child;
(7) Their desire, if they have such, that the name of the child be changed together with the new name desired;
(8) The desire of the petitioners that the said child shall, upon adoption, inherit real and personal property in accordance with the statutes of descent and distribution;
(9) The value of the personal property and of the real estate owned by the child as far as can be ascertained;
(10) That the petitioners are fit persons to have the care and custody of the child;
(11) That they are financially able to provide for him; and
(12) That there has been full compliance with the law in regard to consent to adoption.

(d) The petition must be signed and verified by the petitioners and must be filed in triplicate. The original of the petition shall be held in the office of the clerk of the superior court, a copy sent to the Department of Human Resources, and a copy sent to the director of social services or to the licensed child-placing agency concerned with the order of reference.

(e) The names of the adopting parents must be indexed on the plaintiffs' or petitioners' side of the cross-index of special proceedings. The child's name as used in the proceeding must be indexed on the defendants' or respondents' side of such index. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1995, c. 88, s. 5.)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to adoption petitions filed on or after that date, substituted "DISTRICT COURT" for "SUPERIOR COURT" in the caption of the petition in subsection (a).

§ 48-16: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-17. (Repealed effective July 1, 1996) Interlocutory decree of adoption.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Jurisdiction. — Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care for the child and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding, therefore, upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, — N.C. App. —, 454 S.E.2d 693 (1995).

Simultaneous Adoption and Custody Actions. — Because the legislature has enunciated a public policy that every child should have a permanent plan of care, thus because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

In the absence an order of consolidation when the same child is the subject of a simultaneous custody and adoption proceeding, both the superior and district courts do not have continuing jurisdiction to fully adjudicate the respective issues before them. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

§ 48-18. (Repealed effective July 1, 1996) Effect of interlocutory decree.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Cited in In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993).

§ 48-19: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-20. (Repealed effective July 1, 1996) Dismissal of proceeding.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Cited in In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

§ 48-21: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-22. (Repealed effective July 1, 1996) Contents of final order.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

Cited in Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

§ 48-23. (Repealed effective July 1, 1996) Legal effect of final order.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

§ 48-24: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-25. (Repealed effective July 1, 1996) Record and information not to be made public; violation a misdemeanor.

(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the Department of Human Resources shall be open for general public inspection.

(b) With the exception of the information contained in the final order, it shall be a Class 1 misdemeanor for any person having charge of the file or the record to disclose, except as provided in subsection (d) of this section, G.S. 48-26, and as may be required under the provisions of G.S. 48-27, any information concerning the contents of any papers in the proceeding.

(c) No director of social services or any employee of a social services department nor a duly licensed child-placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its biological, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of social services or child-placing agency; provided, however, that every director of social services and child-placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19.

(d) Notwithstanding any other provision of law, certain nonidentifying information, if known, shall be given by the county department of social services or licensed child-placing agency which has such information in writing on a form provided by the Department of Human Resources to the adoptive parent or parents not later than the date of finalization of the adoption proceedings. The information described in this subsection, if known, shall, upon written request of the adoptee, be made available to the adoptee upon his reaching the age of 21. This information or any part thereof may be withheld only if it is of such a nature that it would tend to identify a biological relative of the adoptee. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor adoptee or to any adoptee who has reached the age of 21 years upon written request by such person to the agency which has the information. The nonidentifying information, if known, may include only the following:

(1) Date of the birth of the adoptee and his weight at birth;
(2) Age of biological parents in years, not dates of birth, at birth of the adoptee;
(3) Heritage of biological parents which shall consist of nationality, ethnic background, and race;
(4) Education, which shall be the number of years of school completed by the biological parents at the time of birth of the adoptee;
(5) General physical appearance of the biological parents at the time of birth of the adoptee in terms of height, weight, color of hair, eyes, skin.

(e) The county department of social services or licensed child-placing agency shall give if available a complete health history of

§ 48-25 has a delayed repeal date. See notes.

biological parents and other relatives to the adoptive parent or parents not later than the date of finalization of the adoption proceedings and to the adoptee upon his written request. The information shall be given on a standardized form provided by the Department of Human Resources and shall include any information which would have a substantial bearing on the adoptee's mental or physical health. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor adoptee or to any adoptee upon written request by such person to the agency which has the information. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1993, c. 539, s. 411; 1994, Ex. Sess., c. 24, s. 14(c).)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (b).

§ 48-26. (Repealed effective July 1, 1996) Procedure for opening record for necessary information.

(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction. The movant must serve a copy of the motion, with proof of service, upon the Department of Human Resources, and the county department of social services or the licensed child placing agency which prepared the report in response to the order of reference issued pursuant to G.S. 48-16. The clerk of superior court shall give at least five days' notice to the Department of Human Resources and county department of social services or licensed child placing agency of every hearing on this motion, whether the hearing is before the clerk or a judge of the district court, and the Department of Human Resources and the county department of social services or licensed child placing agency shall be entitled to appear and be heard in response to the motion. After hearing, the clerk may issue an order to open the record. Such order must be reviewed by a judge of the district court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, the judge may approve the order to open the record.

(b) The original order to open the record must be filed with the proceedings in the office of the clerk of the superior court. If the clerk shall refuse to issue such order, the party requesting such order may appeal to the judge who may order that the record be opened, if, in

§ 48-26 has a delayed repeal date. See notes.

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the judge's opinion, it be to the best interest of the child or of the public. (1949, c. 300; 1985, c. 448; 1995, c. 88, s. 6.)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to adoption petitions filed on or after that date, substituted "district court" for "superior court" in the third and fifth sentences of subsection (a); substituted "the judge" for "he" in the fifth sentence of subsection (a); and substituted "the judge's" for "his" in the last sentence of subsection (b).

§ 48-27: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For this section as in effect until July 1, 1996, see the main pamphlet.

§ 48-28. (Repealed effective July 1, 1996) Questioning validity of adoption proceeding.

(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a biological parent or guardian of the person of the child. The failure on the part of the clerk of the superior court, the county director of social services, or the executive head of a licensed child-placing agency to perform any of the duties or acts within the time required by the provisions of this Chapter shall not affect the validity of any adoption proceeding.

(b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1983, c. 454, s. 6.)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

CASE NOTES

Applied in In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

§§ 48-29 through 48-35: Repealed by Session Laws 1995, c. 457, s. 1, effective July 1, 1996.

Sections Repealed Effective July 1, 1996. These sections are repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1. For these sections as in effect until July 1, 1996, see the main pamphlet.

§ 48-36. (Repealed effective July 1, 1996) Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.

(a) Any person who is 18 or more years of age, or any two such persons who are lawfully married to each other, may petition the clerk of superior court that such person or persons be declared the adoptive parents of any other person who is 18 or more years of age who shall file with the clerk written consent to such adoption. The petitioners must have resided in North Carolina or on a federal territory therein for six months immediately preceding the filing of the petition. The petition and consent shall be filed with the clerk of superior court of the county in which the petitioners reside. The clerk shall not enter any order granting the petition until it has been made to appear to him that one copy each of the petition and the consent have been posted at the courthouse door continuously for 10 days immediately preceding such order. For good cause shown, the clerk may issue an order declaring the petitioners to be the adoptive parents of the person consenting to be adopted.

(b) Upon entry of the order of adoption in accordance with the provisions of subsection (a) of this section, the rights, duties, and obligations of the adoptive parents and the person adopted shall be, in relation to each other, and in relation to all other persons, the same as if the adoption had been completed under the provisions of this Chapter other than those contained in this section, and as if the adoption had taken place immediately before the person adopted became 18 years of age; provided, however, the provisions of this section shall not relieve any person of any duty to support any other person, nor shall the provisions of this section relieve any person of any criminal liability, arising under any other provision of law, for failure to provide support for any person.

(c) Except as provided in subsections (b), (d) and (e) of this section, the provisions of this Chapter which are not a part of this section shall not apply to the adoption of persons who are more than 18 years of age.

(d) Except in the case of a change of name in accordance with subsection (e) of this section, at the time of or subsequent to the entry of the order of adoption, the clerk may for proper cause shown and upon written application of the adoptive parents and the person adopted, issue an order changing the name of the person adopted from his true name to the name applied for. The order shall contain the true name, the county of birth, and the date of birth of each adoptive parent; the true name, the county of birth, and the date of birth of the person adopted; the name of each parent as shown on the birth certificate of the person adopted; and the name sought to be adopted. The clerk shall issue to the person adopted a certificate

§ 48-36 has a delayed repeal date. See notes.

under his hand and seal of office, stating the change made in the name, and shall record the applications and order on the docket of special proceedings in his court. He shall forward a copy of the change of name order to the State Registrar of Vital Statistics if the person adopted was born in North Carolina. Upon receipt of the order, the State Registrar shall note the change of name specified in the order on the birth certificate of the person adopted, and shall notify the register of deeds of the county of birth of the person adopted.

(e) If requested in the application for the change of name filed by the adoptive parents and the person adopted the clerk may, for good cause shown, before or after the entry of the order of adoption, decree a change of name in accordance with and subject to all the provisions of G.S. 48-29.

(f) Within 10 days after the order of adoption is entered, the clerk must file with the Department of Human Resources a copy of the petition giving the date of the filing of the original petition, the consent of the person sought to be adopted, and the order of adoption, and the Department of Human Resources must cause all papers pertaining to the proceeding to be permanently registered and filed. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14.)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

§ 48-37. (Repealed effective July 1, 1996) Compensation for placing or arranging placement of child for adoption prohibited.

No person, agency, association, corporation, institution, society or other organization, except a licensed child-placing agency as defined by G.S. 48-2(4), or a county department of social services, shall offer or give, charge or accept any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. Provided, that the adoptive parents may pay the reasonable and actual medical expenses incurred by the biological mother incident to the birth of the child, and provided that in the petition for adoption the adoptive parents must disclose the amount of these payments and must represent that there were no gifts or payments of, or promises to give or pay, any other fee, compensation, consideration, or thing of value such as is prohibited by this section. The act of preparing and filing the adoption proceeding before the court shall not be construed as receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. Any person who violates any provision of this section shall be guilty of a Class 1 misdemeanor. Any person who is convicted of or pleads guilty to a second or subsequent violation of this section shall be guilty of a Class H felony which may include a fine not more than ten thousand dollars ($10,000). (1975, c. 335, s. 1; 1991, c. 335, s. 1; 1993, c. 539, ss. 412, 1264; 1994, Ex. Sess., c. 24, s. 14(c).)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 1993, c. 539, s. 412, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and, upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court" in the second to last sentence.

Session Laws 1993, c. 539, s. 1264, effective October 1, 1994, and applicable to offenses occurring on or after that date, in the last sentence substituted "Class H felony which may include a fine" for "felony and shall be imprisoned for not more than three years or fined" and deleted from the end "or both at the discretion of the court".

CASE NOTES

Violation of Section. — Actions of adopting parents and their attorney in making funds available for the purpose of bringing a biological mother into the State so as to facilitate the adoption of her unborn child, including supporting her and the child through the date of birth and returning the mother to her home state, constituted a violation of this section. In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

Cancellation of Child Support Arrearages Against Public Policy. — Where the trial court concluded that mother was equitably estopped from collecting the child support arrearages and the sole basis for the estoppel was that the mother had promised she would "not pursue the action for child support arrears" in exchange for the father's consent to adoption, the agreement violated this section in that both the mother and the father gave and received consideration for the placement of the child for adoption. Thus the agreement was void as being contrary to the public policy and could not be used in equity to estop the mother from enforcing her judgment for the full amount of the child support arrearages. State ex rel. Raines v. Gilbert, 117 N.C. App. 129, 450 S.E.2d 1 (1994).

§ 48-38. (Repealed effective July 1, 1996) Advertisements soliciting children for adoption prohibited.

No person, agency, association, corporation, society or other organization, except a licensed child-placing agency as defined in G.S. 48-2, a county department of social services, or the Department of Human Resources, shall publish, transmit, broadcast, or otherwise distribute any advertisement of any type whatsoever which solicits the receiving or placing of children for adoption, or which solicits the custody of children. Any person who violates any provision of this section shall be guilty of a Class 1 misdemeanor. (1975, c. 335, s. 2; 1981, c. 275, s. 6; 1993, c. 539, s. 413; 1994, Ex. Sess., c. 24, s. 14(c).)

Section Repealed Effective July 1, 1996. This section is repealed, effective July 1, 1996, by Session Laws 1995, c. 457, s. 1.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court" in the last sentence.

Chapter 48A.

Minors.

§ 48A-2. Age of minors.

CASE NOTES

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to § 50-13.7. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Stated in Pieper v. Pieper, 90 N.C. App. 405, 368 S.E.2d 422 (1988).

Cited in Williams v. Williams, 97 N.C. App. 118, 387 S.E.2d 217 (1990).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

Sec.
49-7. Issues and orders.
49-8. Power of court to modify orders, suspend sentence, etc.

Article 2.

Legitimation of Illegitimate Children.

49-12.1. Legitimation when mother married.

Article 3.

Civil Actions Regarding Illegitimate Children.

Sec.
49-14. Civil action to establish paternity.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Legal Periodicals. — For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

CASE NOTES

Cited in Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and subject to such penalties as are hereinafter provided" in the first sentence.

CASE NOTES

I. In General.
V. Instructions, Submission to Jury, and Verdict.

I. IN GENERAL.

Effect of Prosecution upon Subsequent Civil Proceedings, etc. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Applied in Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

And Submission of Interrogatories or Issues, etc. — Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

Verdict Held Insufficient. — A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319 (1984).

§ 49-4. When prosecution may be commenced.

CASE NOTES

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. Bertie-Hertford Child Support Enforcement Agency ex rel. Souza v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

§ 49-7. Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the child, subject to the limitations of G.S. 50-13.10. The amount of child support shall be determined as provided in G.S. 50-13.4(c). The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1; 1989, c. 529, s. 6.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

§ 49-8. Power of court to modify orders, suspend sentence, etc.

Upon the determination of the issues set out in G.S. 49-7 and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require subject to the limitations of G.S. 50-13.10. The order or orders made in this regard may include any or all of the following alternatives:

(1) Repealed by Session Laws 1994, Extra Session, c. 14, s. 35, effective October 1, 1994.
(2) Suspend sentence and continue the case from term to term;
(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;
(4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;
(5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this Article. (1933, c. 228, s. 7; 1939, c. 217, s. 6; 1987, c. 739, s. 2; 1994, Ex. Sess., c. 14, s. 35.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "G.S. 49-7" for "in the foregoing section" in the introductory language; and deleted subdivision (1), which read "Commit the defendant to prison for a term not to exceed six months."

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

Cross References. — As to legitimation procedure when mother is married, see § 49-12.1.

Legal Periodicals. —

For article, "The Parental Rights of Unwed Fathers: A Developmental Perspective," see 20 N.C. Cent. L.J. 45 (1992).

CASE NOTES

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure Within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority, pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, — U.S. —, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with adoption petition in lieu of affidavit required by § 48-13, a subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to this section before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). See also § 49-12.1.

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by § 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as § 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985). But see now § 49-12.1(c).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under § 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Cited in Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Action Under § 49-14 Prohibited When Child Is Legitimated. — If child is legitimated by virtue of this section, an action under § 49-14 cannot be maintained, as § 49-14 establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

DNA sampling results may be used to rebut the presumption that a child born to a married woman is her husband's child and to simultaneously offer evidence that a person was "born out of wedlock" within the meaning of this section. Batcheldor v. Boyd, 108 N.C. App. 275, 423 S.E.2d 810 (1992), cert. denied, 333 N.C. 254, 426 S.E.2d 700 (1993).

Applied in DOT v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985).

§ 49-12.1. Legitimation when mother married.

(a) The putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child. The procedures shall be the same as those specified by G.S. 49-10, except that the spouse of the mother of the child shall be a necessary party to the proceeding and shall be properly served. A guardian ad litem shall be appointed to represent the child if the child is a minor.

(b) The presumption of legitimacy can be overcome by clear and convincing evidence.

(c) The parties may waive a jury trial and enter a consent order with the approval of the clerk of superior court. The order entered by the clerk shall find the facts and declare the proper person the father of the child and may change the surname of the child.

(d) The effect of legitimation under this section shall be the same as provided by G.S. 49-11.

(e) A certified copy of the order of legitimation under this section shall be sent by the clerk of superior court under his official seal to the State Registrar of Vital Statistics who shall make a new birth certificate bearing the full name of the father of the child and, if ordered by the clerk, changing the surname of the child. (1991, c. 667, s. 2; 1991 (Reg. Sess., 1992), c. 1030, s. 15.)

Editor's Note. — Session Laws 1991, c. 667, s. 3 made this section effective October 1, 1991.

§ 49-13. New birth certificate on legitimation.

Cross References. — As to new birth certificate, see also § 49-12.1.

CASE NOTES

Cited in Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be by clear, cogent, and convincing evidence.

(c) **(See editor's note)** No such action shall be commenced nor judgment entered after the death of the putative father, unless the action is commenced either:

(1) Prior to the death of the putative father;
(2) Within one year after the date of death of the putative father, if a proceeding for administration of the estate of the putative father has not been commenced within one year of his death; or
(3) Within the period specified in G.S. 28A-19-3(a) for presentation of claims against an estate, if a proceeding for administration of the estate of the putative father has been commenced within one year of his death.

Any judgment under this subsection establishing a decedent to be the father of a child shall be entered nunc pro tunc to the day preceding the date of death of the father.

(d) **(See editor's note)** If the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2; 1993, c. 333, s. 3; 1995, c. 424, ss. 1, 2.)

Editor's Note. — Session Laws 1993, c. 333, s. 3, amended this section effective October 1, 1993, and applicable to civil paternity actions filed on or after that date.

Session Laws 1995, c. 424, which amended subsections (c) and (d), in s. 3 provides that the 1995 amendments to this section are effective October 1, 1995, and are applicable to actions commenced on or after that date, but before October 1, 1998, without regard to the date of death of the putative father, and that the act expires October 1, 1998.

Effective October 1, 1998, subsection (c) will read: "No such action shall be commenced nor judgment entered after the death of the putative father."

Effective October 1, 1998, subsection (d) will read: "If the action to establish paternity is brought more than three years after birth of a child, paternity shall not be established in a contested case without evidence from a blood or genetic marker test."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, rewrote subsection (c), and added "or is brought after the death of the putative father" in subsection (d).

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Editor's Note. *— The cases annotated below were decided prior to the 1993 amendment to § 49-14, which, inter alia, changed the evidentiary standard from beyond a reasonable doubt to clear, cogent and convincing evidence.*

Purpose, etc. —

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

The legislative purpose underlying this section's paternity actions is to provide the basis or means of establishing the identity of the putative father in order to allow the courts to impose an obligation of support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

There are several ways to legitimate children in North Carolina: 1) verified petition filed with the superior court by the putative father, 2) subsequent marriage of the parents, or 3) civil action to establish paternity. Helms v. Young-Woodard, 104 N.C. App. 746, 411 S.E.2d 184 (1991), cert. denied, 331 N.C. 117, 414 S.E.2d 756, — U.S. —, 113 S. Ct. 91, 121 L. Ed. 2d 53 (1992).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Action Under This Section Prohibited When Child Is Legitimated. — If child is legitimated by virtue of § 49-12, an action under this section cannot be maintained, as this section establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Only Parent Who Has Custody of Child May Bring Action for Support. — Although plaintiff alleged that he was the father of the child, he did not allege that he had custody, therefore under the provisions of § 50-13.4, only a parent who has custody of a minor child may bring an action for its support. Becton v. George, 90 N.C. App. 607, 369 S.E.2d 366 (1988).

Failure to Join Child Does Not Require Dismissal. — In a civil action to establish paternity of an alleged illegitimate child the failure to properly join that child does not justify dismissal of the action. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

If the legislature had intended to require the child to be joined as a necessary party in an action under § 49-14, then it would have specifically stated such, as it did in § 49-10. Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

Effect of Criminal Proceedings, etc. —

General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

No Certified Copies of Birth Certificates Attached to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiffs' petition, court was without subject matter jurisdiction to adjudicate defendant's paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Claim of Being Tricked into Fathering Child Not Appropriate as

Defense. — Argument of defendant in paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial responsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Standard of Proof. — Section 49-10, just as this section, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. Smith v. Price, 74 N.C. 413, 340 S.E.2d 408 (1986).

Testimony by Expert Concerning Paternity. — Although it may be proper for a qualified physician to testify concerning the result of a defendant's blood test and concerning the use and application of the paternity index, it is not proper to allow the expert to state his opinion concerning paternity, as such an opinion is of no assistance to the trier of fact. The jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under § 49-10 to have child legitimated. In re Locklear ex rel. Jones, 314 N.C. 412, 334 S.E.2d 46 (1985).

DNA or Gene Testing. — Trial court erred in ordering DNA or gene testing subsequent to an adjudication of paternity. State ex rel. Hill v. Manning, 110 N.C. App. 770, 431 S.E.2d 207 (1993).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. —

For article, "Custody of the Illegitimate Child," see 18 N.C. Cent. L.J. 18 (1989).

CASE NOTES

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Retroactive Child Support Awards Authorized. — Trial court was not precluded as a matter of law from awarding retroactive child support under this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in § 1-52(2).

Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Extent of Recovery for Past Expenditures. — Assuming adequate proof of the expenditures under § 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Failure to Attach Certified Copies of Birth Certificates to Petition. — In action under Uniform Reciprocal Enforcement of Support Act, where the record disclosed that no certified copies of the birth certificates of the alleged children-obligees were attached to plaintiff's petition, court was without subject matter jurisdiction to adjudicate defendants' paternity. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Effect of Criminal Proceedings upon Proceedings to Establish Paternity. — General verdict of not guilty, upon charges of willful neglect and refusal to provide adequate support of an illegitimate child, did not operate as res judicata on the issue of paternity in subsequent action to establish paternity and require support of an illegitimate child. Sampson County ex rel. Child Support Enforcement Agency ex rel. McPherson v. Stevens, 91 N.C. App. 524, 372 S.E.2d 340 (1988).

Reimbursement by State upon Receipt of Test Results. — Conclusion that defendant was not child's father and that the State was obligated to reimburse defendant for the monies it illegally garnished from his pay arose as a matter of law from paternity test results, which plaintiff and the court accepted as binding when order was entered, and stating those conclusions and ending the case properly in compliance with the law was the court's duty. State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991).

Cited in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Smith v. Davis, 88 N.C. App. 557, 364 S.E.2d 156 (1988).

§ 49-16. Parties to proceeding.

CASE NOTES

Quoted in Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994).

§ 49-17. Jurisdiction over nonresident or nonpresent persons.

CASE NOTES

Constitutionality. — This section satisfies the first prong of the test set out in Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977) by creating special jurisdiction under very limited circumstances; on its face, this statute is constitutionally sound and although the language in this section which refers to "minimum contacts" is misleading and confusing in the context of the Dillon requirements, the intent of the statute is not to abrogate the second prong of the Dillon test; rather, the statute simply creates special jurisdiction in certain situations. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Due Process Requirements Satisfied. — In paternity suit, where the trial court adequately inquired into the defendant's contacts with this State and so set those findings out in its order without objection of the defendant, the hearing which was held on defendant's motion to dismiss for lack of personal jurisdiction comported with all due process requirements. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

North Carolina courts have a legitimate interest in protecting our citizens under circumstances such as those enumerated in this section. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

Chapter 49A.

Rights of Children.

ARTICLE 1.

Children Conceived by Artificial Insemination.

§ 49A-1. Status of child born as a result of artificial insemination.

Legal Periodicals. — For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

Chapter 50.

Editor's Note. — The legislation and annotations affecting Chapter 50 have been included in a recently published replacement chapter.

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

Cited in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989); Stancil v. Brock, 108 N.C. App. 745, 425 S.E.2d 446 (1993); In re Duncan, 112 N.C. App. 196, 435 S.E.2d 121 (1993); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

§ 50A-2. Definitions.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-3. Jurisdiction.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (UCCJA), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Where an Indiana order, which awarded custody of child living in Indiana to mother, contained no findings of fact that Indiana was child's home state, or had been her home state within six months before the action was commenced, or that it was in her best interests for Indiana to assume jurisdiction because she had significant connection with the state, a North Carolina trial court erred in concluding that North Carolina must give full faith and credit to the Indiana orders; the Indiana court had not assumed jurisdiction over the custody determination of the child in substantial conformity with this Act. Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

Exercise of Jurisdiction Upheld. —

Where the minor child resided in North Carolina for about one year after birth, North Carolina was the only state where the parties and the minor child lived as a family unit and, although there are a number of witnesses that reside in New Hampshire, there are numerous other witnesses who reside in North Carolina, district court's order that North Carolina was the most appropriate and convenient forum was appropriate. Westneat v. Westneat, 113 N.C. App. 247, 437 S.E.2d 899 (1994).

Proper Determination of Home State. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Where children had lived in North Carolina continuously from March 1987 until March 1989 when custody action was filed except for the 10-month period during which the children resided with defendant in Georgia pursuant to the Georgia temporary custody decree and the plaintiff resided in North Carolina for the entire period, the trial court correctly determined that North Carolina was the home state, thereby meeting one of the bases of jurisdiction under this section. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Significant Connection. — Where children resided in North Carolina for all but ten months of the two-year period prior to this action and that plaintiff resided in North Carolina for the entire period, the children and plaintiff had a "significant connection" with North Carolina, and there was substantial evidence regarding the children's "present or future care, protection, training, and personal relationships" in North Carolina. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Applied in Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991).

Cited in In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-5. Service of notice.

CASE NOTES

Applied in Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

Quoted in Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

Refusal to Assert Jurisdiction Held Proper. — For case holding trial court properly declined to assert jurisdiction based upon conclusion that another state had assumed jurisdiction as the home state of the children involved in the custody matter in question, see Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

Cited in Williams v. Williams, 110 N.C. App. 406, 430 S.E.2d 277 (1993).

§ 50A-9. Information under oath to be submitted to the court.

CASE NOTES

This section requires that every party in a custody pleading must give information under oath regarding the children's present address, the places where they have lived within the last five years, and the names and present addresses of the persons with whom the children have lived during that period. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Proper Exercise of Jurisdiction Despite Noncompliance with Oath Requirements. — Court of appeals declined to accept plaintiff's argument that failure to comply fully with this section's oath requirements defeated the court's subject matter jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

Failure to Attempt Service. — Where there was no attempt to serve other parent with notice of a Tennessee temporary custody hearing and she in fact never received notice of the hearing, the Tennessee court did not act substantially in conformity with this Chapter, and the order made by the Tennessee court was jurisdictionally defective. Henson v. Henson, 95 N.C. App. 777, 384 S.E.2d 70 (1989).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

Georgia's version of the Uniform Child Custody Jurisdiction Act (UCCJA) conforms to North Carolina's version. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Proper Exercise of Jurisdiction and Modification of Custody Decree. — Mother and children had significant connection to North Carolina and there was substantial evidence in North Carolina. Therefore, North Carolina court correctly determined that North Carolina, not Georgia, was home state. Court did not err in assuming jurisdiction and modifying Georgia custody decree, even though children resided in Georgia and there was no evidence that Georgia had declined jurisdiction. Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990).

Trial Court Erred in Exercising Jurisdiction. — The trial court in this State erred in exercising its jurisdiction over a custody matter where a proceeding was already pending in an Indiana court and the child had lived in Indiana since 1981, a period of six years. Indiana was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), and North Carolina was required to decline jurisdiction over the custody issue. Lynch v. Lynch, 96 N.C. App. 601, 386 S.E.2d 607 (1989).

§ 50A-15. Filing and enforcement of custody decree of another state.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

§ 50A-20. Assistance to courts of other states.

CASE NOTES

Court erred in authorizing law enforcement officers to pick up children who were residing with petitioner and deliver them to respondent in an effort to assist Georgia court in enforcing its custody order; while trial court could have resorted to traditional contempt proceedings, there was no statutory basis for invoking the participation of law enforcement officers in producing the children. Bhatti v. Bhatti, 98 N.C. App. 493, 391 S.E.2d 201 (1990).

Chapter 50B.

Domestic Violence.

Sec.
50B-3. Relief.

§ 50B-3. Relief.

(a) The court may grant any protective order or approve any consent agreement to bring about a cessation of acts of domestic violence. The orders or agreements may:

(1) Direct a party to refrain from such acts;
(2) Grant to a spouse possession of the residence or household of the parties and exclude the other spouse from the residence or household;
(3) Require a party to provide a spouse and his or her children suitable alternate housing;
(4) Award temporary custody of minor children and establish temporary visitation rights;
(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it;
(6) Order either party to make payments for the support of a minor child as required by law;
(7) Order either party to make payments for the support of a spouse as required by law;
(8) Provide for possession of personal property of the parties;
(9) Order a party to refrain from harassing or interfering with the other;
(10) Award costs and attorney's fees to either party;
(11) Prohibit a party from purchasing a firearm for a time fixed in the order;
(12) **(Effective October 1, 1996)** Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is available within a reasonable distance of that party's residence and is approved by the Department of Administration; and
(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

(b) Protective orders entered or consent orders approved pursuant to this Chapter shall be for a fixed period of time not to exceed one year.

(c) A copy of any order entered and filed under this Article shall be issued to each party. In addition, a copy of the order shall be issued to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides.

(d) **(Effective April 1, 1996)** The sheriff of the county where a domestic violence order is entered shall provide for immediate entry of the order onto the Division of Criminal Information Network and shall provide for access of such orders to magistrates on a 24-hour-

§ 50-3(d) has a delayed effective date. See notes.

a-day basis. Modifications of the order shall also be entered. (1979, c. 561, s. 1; 1985, c. 463; 1994, Ex. Sess., c. 4, s. 2; 1995, c. 527, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to offenses committed on or after that date, added subdivisions (a)(11) and (a)(13); effective October 1, 1996, the 1995 amendment also added subdivision (a)(12); and effective April 1, 1996, the 1995 amendment added subsection (d).

Chapter 51.

Marriage.

Article 1.

General Provisions.

Sec.
51-2. Capacity to marry.

Article 2.

Marriage Licenses.

51-7. Penalty for solemnizing without license.
Sec.
51-9 through 51-11. [Repealed.]
51-12. [Repealed.]
51-13. [Repealed.]
51-15. Obtaining license by false representation misdemeanor.
51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

CASE NOTES

Applied in State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990).

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

CASE NOTES

Where marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354, cert. denied, 313 N.C. 599, 332 S.E.2d 178 (1985).

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 56 of Chapter 7A or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(b) When an unmarried female who is more than 12 years old, but less than 18 years old, is pregnant or has given birth to a child and such unmarried female and the putative father of the child, either born or unborn, shall agree to marry, and consent in writing to such marriage, as set out in subsection (a), subdivisions (1), (2), (3) or (4) above, or by the director of social services of the county of residence of either party, is given on the part of the female, the register of deeds is authorized to issue to said parties a license to marry, and it shall be lawful for them to marry in accordance with the provisions of this Chapter.

(c) When a license to marry is procured by or on behalf of any person under 18 years of age by fraud or misrepresentation, a parent or person standing in loco parentis to such person under 18 years of age shall be a proper party plaintiff in an action to annul said marriage. (R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608.)

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Bigamous Marriages Are Void. — A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Wife who knowingly entered a bigamous marriage was subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct; therefore, the trial court correctly terminated husband's obligation to pay alimony under the separation agreement. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Applied in Heiser v. Heiser, 71 N.C. App. 223, 321 S.E.2d 479 (1984).

ARTICLE 2.

Marriage Licenses.

§ 51-7. Penalty for solemnizing without license.

Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars ($200.00) to any person who sues therefor, and he shall also be guilty of a Class 1 misdemeanor. (R.C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C.S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5; 1993, c. 539, s. 415; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

§§ 51-9 through 51-11: Repealed by Session Laws 1994, c. 647, ss. 1-3, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6 provides that ss. 1 to 3, which repealed these sections, apply to marriage license applications filed on or after that date.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27, effective January 1, 1986.

§ 51-13: Repealed by Session Laws 1994, c. 647, s. 4, effective October 1, 1994.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 647, s. 6, provides that s. 4, which repealed this section, applies to marriage license applications filed on or after that date.

The repealed section was amended by Session Laws 1993, c. 539, s. 416, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. The section is set out above as repealed.

§ 51-15. Obtaining license by false representation misdemeanor.

If any person shall obtain a marriage license by misrepresentation or false pretenses, he shall be guilty of a Class 3 misdemeanor. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4; 1993, c. 539, s. 417; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00), or imprisoned not exceeding 30 days, or both, at the discretion of the court".

§ 51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

(a) When it shall appear to the register of deeds of any county in this State that the names of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name and names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction.

(b) When the name of a party to a marriage has been changed by court order as the result of a legitimation action or other cause of action, and the party whose name is changed present a signed affidavit to the register of deeds indicating the name change and requesting that the application for a marriage license, the marriage license, and the marriage certificate of the officiating officer be amended by substituting the changed name for the original name, the register of deeds may amend the records as requested by the party, provided the other party named in the records consents to the amendment. (1953, c. 797; 1959, c. 344; 1987, c. 576.)

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.

52-11. Antenuptial contracts and torts.

§ 52-3. Married person may insure spouse's life.

CASE NOTES

Insurable Interest in Spouse's Life. — This section does not create in a wife an insurable interest in the life of her husband. She has such an interest without the benefit of the section. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991).

Right to Insure Spouse's Life Without Consent. — This section gives married persons the right to insure their spouses' lives without their consent. Cook v. Bankers Life & Cas. Co., 329 N.C. 488, 406 S.E.2d 848 (1991), distinguishing Acme Mfg. Co. v. McCormick, 175 N.C. 277, 95 S.E. 555 (1918).

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

CASE NOTES

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

§ 52-10. Contracts between husband and wife generally; releases.

CASE NOTES

Postnuptial agreement executed in 1977 could not be set aside due to any alleged noncompliance with former § 52-6 (repealed 1977) or § 52-10 (amended 1977). Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994).

To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of § 52-10.1, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

§ 52-10.1. Separation agreements.

Legal Periodicals. —

For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

CASE NOTES

Separation Agreements Binding. — Under this section separation agreements are binding in all respects so long as they are not inconsistent with public policy and parties may, in settling disputes, agree to the payment of attorney's fees. Bromhal v. Stott, 116 N.C. App. 250, 447 S.E.2d 481 (1994), petition denied as to additional issues, 339 N.C. 609, 454 S.E.2d 246 (1995).

Presumption of Validity of Acknowledgment. — To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and where plaintiff never asserted that the actual signature on an agreement was other than his own, but suggested only a technical violation of this section, he did not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment. Moore v. Moore, 108 N.C. App. 656, 424 S.E.2d 673, aff'd per curiam, 334 N.C. 684, 435 S.E.2d 71 (1993).

§ 52-10.2. Resumption of marital relations defined.

CASE NOTES

There are two lines of cases regarding resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element; these two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Future, but Not Existing, Alimony Obligations Cease upon Reconciliation. — When the parties resumed marital relations, appellant's obligations to pay alimony in the future ceased. His duty under the consent judgment to pay alimony up to the date of reconciliation, however, as an executed portion of the consent judgment, remained enforceable through the court's contempt power. Schultz v. Schultz, 107 N.C. App. 366, 420 S.E.2d 186 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

§ 52-11. Antenuptial contracts and torts.

The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C.S., s. 2517; 1965, c. 878, s. 1.)

Editor's Note. —
This section has been set out above, as it was inadvertently omitted from the main pamphlet.

Chapter 52A.

Editor's Note. — The legislation and annotations affecting Chapter 52A have been included in a recently published replacement chapter.

Chapter 52B.

Uniform Premarital Agreement Act.

Sec.
52B-7. Enforcement.

Editor's Note. — The official commentary to this Act has been printed in the main volume through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Act may be ordered from them at a cost of $10.00, plus $3.00 shipping and handling at 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, (312) 915-0195.

§ 52B-1. Short title.

Legal Periodicals. — For article, "North Carolina's Uniform Premarital Agreement Act, A Contract Perspective," see 12 Campbell L. Rev. 221 (1990).

For comment, "The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage," see 28 Wake Forest L. Rev. 1037 (1993).

§ 52B-2. Definitions.

CASE NOTES

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-3. Formalities.

CASE NOTES

Acknowledgment Not Required. — The Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990).

§ 52B-7. Enforcement.

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

- (1) That party did not execute the agreement voluntarily; or
- (2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
  - (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. Before the court orders support under this subsection, the court must find that the party for whom support is ordered is a dependent spouse, as defined by G.S. 50-16.1A, and that the requirements of G.S. 50-16.2A regarding postseparation support or G.S. 50-16.3A regarding alimony have been met.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law. (1987, c. 473, s. 1; 1995, c. 319, s. 11.)

Cross References. — As to postseparation support, see § 50-16.2A.

Editor's Note. — Session Laws 1995, c. 319, which amended this section, in s. 12, provides: "This act shall not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on October 1, 1995."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to civil actions filed on or after that date, substituted "G.S. 50-16.1A, and that the requirements of G.S. 50-16.2A regarding postseparation support or G.S. G.S. 50-16.3A regarding alimony have been met" for "G.S. 50-16.1, and that there are grounds for alimony under G.S. 50-16.2 or alimony pendente lite under G.S. 50-16.3".

CASE NOTES

A premarital agreement concerning alimony is void as against public policy. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Invalidity of alimony provision in a premarital agreement did not affect the property provisions of the agreement. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Party Claiming Invalidity Has Burden of Proof. — In an action to enforce a premarital agreement executed prior to enactment of Chapter 52B, the party claiming the invalidity of the agreement for reasons of undue influence, duress, fraud, unconscionability or inadequate disclosure has the burden of proof. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Presentation of a premarital agreement to wife on the day before the wedding, combined with the threat that the marriage would not take place unless the document was executed, did not amount to duress and undue influence. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Premarital Agreement Was Not Sufficiently Identical to Act. — Trial court erred in concluding that premarital agreement was sufficiently identical to the Equitable Distribution Act to allow the trial court to distribute the property according to the Act despite the premarital agreement, where the Act did not exist at the time of the agreement's execution, and the parties could not have intended that the Act govern their property division. Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989), cert. denied, 326 N.C. 482, 392 S.E.2d 90 (1990), decided under law in effect prior to enactment of Chapter 52B.

Foreign Contract. — Syrian contract would not be viewed as a premarital agreement limiting plaintiff's relief under the laws of North Carolina because the contract, signed by plaintiff's father as her agent, did not meet the requirements of this chapter. Atassi v. Atassi, 117 N.C. App. 506, 451 S.E.2d 371 (1995).

Cited in King v. King, 114 N.C. App. 454, 442 S.E.2d 154 (1994).

§ 52B-9. Limitation of actions.

CASE NOTES

Cited in Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1995

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1995 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina